(12)

No. 90-634-CSX
Status: GRANTED

Title: Dan Cohen, Petitioner
v.
Cowles Media Company, dba Minneapolis Star and Tribune Company, et al.

Docketed:
October 17, 1990

Court: Supreme Court of Minnesota

Counsel for petitioner: Rothenberg,Elliot C.

Counsel for respondent: Borger,John, Hannah,Paul

Entry	Date	Note	Proceedings and Orders
1	Oct 17 1990	G	Petition for writ of certiorari filed.
2	Oct 17 1990		Appendix of petitioner filed.
3	Nov 15 1990		Brief of respondent Cowles Media Company, etc. in opposition filed.
4	Nov 15 1990		Brief of respondent Northwest Publications, Inc. in opposition filed.
5	Nov 20 1990		DISTRIBUTED. December 4, 1990
6	Nov 21 1990	X	Reply brief of petitioner Dan Cohen filed.
7	Dec 10 1990		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
8	Dec 21 1990		Record filed.
		*	certified copy of original record recceived. (Box)
9	Jan 23 1991		Brief of petitioner Dan Cohen filed.
10	Jan 23 1991		Joint appendix filed.
11	Jan 25 1991		Lodging received. (15 copies).
12	Feb 1 1991		SET FOR ARGUMENT WEDNESDAY, MARCH 27, 1991. (1ST CASE)
13	Feb 21 1991		CIRCULATED.
14	Feb 22 1991	X	Brief of respondent Cowles Media Company, etc. filed.
15	Feb 22 1991	X	Brief of respondent Northwest Publications, Inc. filed.
16	Feb 22 1991	X	Brief amici curiae of Advance Publications, et al. filed.
17	Mar 15 1991	X	Reply brief of petitioner Dan Cohen filed.
18	Mar 27 1991		ARGUED.

No. 90 634

IN THE

Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

Elliot C. Rothenberg
3901 West 25th Street
Minneapolis, MN 55416
(612) 926-8185
Counsel for Petitioner

1990 — Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411 — 588-7506

QUESTIONS PRESENTED FOR REVIEW

Does the First Amendment of the U.S. Constitution grant newspapers immunity from liability for damages caused by dishonoring promises of confidentiality given in exchange for information on a political candidate?

Does the Contract Clause of the U.S. Constitution permit state courts to declare unenforceable agreements of confidentiality between newspapers and sources of information?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

IN THE

Supreme Court of the United States

October Term, 1990

No. _____

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

The petitioner, Dan Cohen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Minnesota entered in this proceeding on July 20, 1990.

REPORTS OF OPINIONS IN THIS CASE DELIVERED BY COURTS BELOW

1. 14 Med. L. Rptr. 1460 (Minn. Dist. Ct. 1987).
2. 15 Med. L. Rptr. 2288 (Minn. Dist. Ct. 1988).
3. 445 N.W.2d 248 (Minn. App. 1989).
4. 457 N.W.2d 199 (Minn. 1990).

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Judgment of the Supreme Court of Minnesota was dated July 20, 1990. Jurisdiction of this Court is conferred by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 10, cl. 1. No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . .

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . .

Amendment XIV, § 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

On October 27, 1982, Dan Cohen, then working for Minnesota Republican gubernatorial nominee Wheelock Whitney in his position as public relations director of a Minneapolis advertising agency, contacted reporters from Minnesota's two largest newspapers—the Star Tribune of Minneapolis and the St. Paul Pioneer Press Dispatch. In separate meetings with each reporter, Mr. Cohen stated:

> I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this,

> and you will also agree that you're not going to pursue with me a question of who my source is, then I'll furnish you with the documents.

Mr. Cohen demanded commitments of anonymity because he feared retaliation.

The reporters were experienced journalists covering the gubernatorial election who knew that he was an active Republican associated with the Whitney campaign. They agreed to his conditions and promised him confidentiality.

Mr. Cohen then gave each authentic copies of public court records documenting Democratic lieutenant governor candidate Marlene Johnson's arrest for unlawful assembly in 1969, her conviction of petit theft in 1970 and the 1971 vacating of it.

Star Tribune reporter Lori Sturdevant told Mr. Cohen, "This is the sort of thing that I'd like to have you bring by again if you ever have anything like it." Pioneer Press reporter Bill Salisbury told him the documents were "political dynamite." A-23.

Mr. Cohen also contacted reporters from the Associated Press and WCCO-TV (the Minneapolis CBS affiliate) and gave them the same documents after each promised him confidentiality.

The Associated Press and WCCO-TV honored their promises. The former published a story without identifying Mr. Cohen; the latter did not broadcast the story.

In contrast, after being informed of the promises to Mr. Cohen, editors of the two newspapers decided to use the documents supplied by him but to renege on these promises. Both reporters objected strongly, and Ms. Sturdevant demanded that her name not appear on the published story.

Star Tribune editors instructed Ms. Sturdevant to ask Mr. Cohen to release the Star Tribune from what editor Frank Wright called "this agreement." Tr. at 1490. She telephoned Mr. Cohen two or three times, but each time Mr. Cohen refused to allow his name to be published. The editors did so anyway. A-24.

The next day, October 28, both newspapers published articles about Ms. Johnson's arrests and conviction which identified Mr. Cohen as the source of the information. The Star Tribune's front page article also named Mr. Cohen's employer.

Mr. Cohen was fired the day the articles were published.

The following day, a Star Tribune columnist attacked Mr. Cohen for supplying the documents to the newspaper. The day after that, the Star Tribune published an editorial cartoon depicting Mr. Cohen as a garbage can labeled "last minute campaign smears."

None of the aforementioned articles disclosed that the newspapers made and broke promises to Mr. Cohen.

Mr. Cohen sued the newspapers for breach of contract and misrepresentation. The trial court, in its opinions denying motions for summary judgment and judgment notwithstanding the verdict, ruled that the First Amendment did not bar this action. Finding liability on both claims, the jury awarded Mr. Cohen $200,000 in compensatory and $500,000 in punitive damages. The Minnesota Court of Appeals reversed the finding of misrepresentation, and therefore the award for punitive damages, but affirmed the verdict of compensatory damages for breach of contract over defendants' First Amendment arguments.

The Minnesota Supreme Court, by a vote of four to two, reversed the compensatory damages award. It first held that

a contract cause of action was inappropriate for promises of news source confidentiality even with the existence of an offer, an acceptance, consideration, and a breach and the intention of the promisors to keep their promises. It then held that, despite Mr. Cohen's injuries from reliance upon the newspapers' promises, enforcement of these promises under a contract implied by a promissory estoppel theory would violate the newspapers' First Amendment rights. A-13-14. "Of critical significance in this case, we think, is the fact that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign." A-13.

Defendants raised First Amendment issues in their answers, their motions for summary judgment and judgment notwithstanding the verdict, and their appeals to the Minnesota Court of Appeals and the Minnesota Supreme Court. Respondent Northwest Publications told the Minnesota Supreme Court (reply brief at 11), "The precise question before this Court is whether an accommodation of First Amendment interests must be made here . . ." In a statement issued after the decision below, Star Tribune executive editor Joel R. Kramer said, "We are especially pleased that the court has ruled that the decision to publish true facts relating to the activities of a 'political source in a political campaign' is one that is protected by the First Amendment." New York Times, July 21, 1990, at 6, col. 4.

Petitioner raised the issue of the Constitution's prohibition against any state law impairing the obligation of contracts in his brief to the Minnesota Supreme Court (at 48) in response to the dissenting opinion of Judge Gary Crippen of the Minnesota Court of Appeals. A-48-50. The opinion below did not specifically pass upon this issue.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT ISSUE NOT PREVIOUSLY THE SUBJECT OF A SUPREME COURT DECISION.

This case raises the question of whether the First Amendment empowers newspapers to inflict injuries with impunity by deliberately breaking promises of confidentiality given for the purpose of obtaining desired information. No previous decision of this Court has specifically addressed this issue. Minnesota Supreme Court Justice Lawrence Yetka in his dissent said that the First Amendment "is being misused" to enable the press to avoid liability for the consequences of broken promises. A-14. Should the press be allowed to employ the Constitution to thwart a remedy for acts, assailed as unethical even by media supporters, which would be unlawful when committed by others?

First Amendment attorney Floyd Abrams called the newspapers' behavior "reprehensible and damaging to all journalists." New York Times, July 21, 1990, at 6, col. 4. Legal affairs columnist Lyle Denniston said that the breaking of promises of confidentiality "is a straightforward, baldfaced ethical violation." Star Tribune, July 23, 1988, at 1A, col. 5. Minnesota Supreme Court dissenting Justice Glenn Kelley reproached "the perfidy of these defendants, the liability for which they now seek to escape by trying to crawl under the aegis of the First Amendment, which, in my opinion, has nothing to do with the case." A-18. The Minnesota Court of Appeals held that certain evidence was admissible "to show that the Tribune was acting with willful indifference to his rights, and was continuing to disparage him while failing to disclose its own breach of promise." A-44.

Trial Judge Franklin Knoll termed defendants' "knowing and willful breach of a legally sufficient contract . . . a calculated misdeed." A-69. Even the Minnesota Supreme Court majority called dishonorable and contrary to a moral obligation the breaking of promises made to induce a source to give information. A-8.

This case has attracted national attention from the news media and scholars.[1] Even the respondents have acknowledged that this is a case of national importance. In its petition for review to the Minnesota Supreme Court (at 2), Cowles Media Co. told that court that its decision "will help to develop and clarify the law and likely will have nationwide as well as statewide impact." Louise Sommers, an attorney for the Associated Press which filed an amicus brief below, called the Minnesota Supreme Court decision a major victory for the news media. Washington Post, July 21, 1990, at A3, col. 1.

Confidential sources are a regular, indeed an essential, component of news gathering. They are used in reporting on almost all news areas, but are relied upon most heavily in reporting about the subject of government. A-8; Wall Street Journal, July 23, 1990, at B2, col. 3; *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1299 (D. Minn. 1990).

---

[1]This case has been the subject of articles in Time magazine (August 1, 1988, at 61), the New York Times (July 23, 1988, at 6, col. 5; July 24, 1988, § 1, at 10, col. 4; July 31, 1988, § 4, at 7, col. 1; Aug. 9, 1988, at 40, col. 2; Sept. 6, 1989, at 15, col. 5; July 21, 1990, at 6, col. 4), the Wall Street Journal (August 11, 1988, at 23, col. 3; July 23, 1990, at A1, col. 3, and B2, col. 3), the Washington Post, June 13, 1988, at A4, col. 2; July 21, 1990, at A3, col. 1), and others. It was featured on the MacNeil/Lehrer Newshour (July 26, 1988). In addition to the 1988 and 1989 law and journalism review articles cited in the petition, this case is discussed in R. SMOLLA, LAW OF DEFAMATION, § 12.06[3] (1990); and D. GILLMOR & J. BARRON, MASS COMMUNICATION LAW: CASES AND COMMENT 362, 394 (5th ed. 1990).

Dependence upon confidential sources has increased over the past twenty years; today, eighty percent of national news magazine articles and fifty percent of national wire service stories, for example, rely on confidential sources. Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement,* 73 Minn. L. Rev. 1553, 1563 (1989). Fully 42% of former federal officials in policy making positions questioned in a recent survey admitted having given the press information on condition of anonymity while in office. E. ABEL, LEAKING: WHO DOES IT? WHO BENEFITS? AT WHAT COST? 62 (1987).

Another survey showed that Pulitzer Prize nominees have used confidential sources in more than 30% of their stories. Two-thirds of the nominees said that information from confidential sources played a significant role in the development of stories nominated for the prize. Several agreed that the more important the story, the more likely the need for confidentiality. "When it comes to stories that count, i.e., those that are embarrassing to government officials and politicians, the use of confidential sources is often a necessity." Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas,* 17 Colum. Hum. Rts. L. Rev. 57, 73-4 (1985).

Information on political candidates often comes from confidential sources supporting opponents. R. CLURMAN, BEYOND MALICE: THE MEDIA'S YEARS OF RECKONING 158 (1988).

Journalism executive and educator Richard M. Clurman says that eliminating the use of confidential sources would carry a price "so high as to be unacceptable, not only to the press but to the public. Full disclosure would eliminate

much of the most valuable information and insights that regularly appear in news stories." Abandoning the use of confidential sources would deprive the public of "a large percentage of the valuable, accurate and important stories that appear in print and on the air." On one typical day, the Washington Post attributed information to unidentified sources 106 times, the New York Times about as many, and the Wall Street Journal 42 in one story alone. *Id.*

Breaches of these promises may cause serious injury to the sources. "Their status in the community, their careers, perhaps even their lives may be at risk." *Ruzicka,* 733 F. Supp. at 1299.

Legalizing the violation of these promises would deter other potential sources resulting in the denial of important information to the public. *Id.*, A-8, A-15, A-18, A-35.

Recognizing the importance of confidential sources, 26 states have adopted shield laws. The Minnesota free flow of information act (whose adoption was lobbied for by respondents) and other such laws protect the news media from compelled disclosure of sources in courts and other proceedings. Minnesota Supreme Court brief of Northwest Publications at 24; A-18 n. 1. Minn. Stat. § 595.022 entitled "public policy" states that the public interest and free flow of information require protection of the confidential relationship between reporter and source.[2]

Nevertheless, media exposure of confidential sources is becoming more common. *Ruzicka,* 733 F. Supp. at 1299;

[2]Justice Yetka called it "unconscionable to allow the press on the one hand to hide behind the shield of confidentiality when it does not want to reveal the source of its information; yet, on the other hand, to violate confidentiality agreements with impunity when it decides that disclosing the source will help make its story more sensational and profitable." A-15.

Langley & Levine, *Broken Promises,* Colum. Journalism Rev. (July/Aug. 1988) 21, 21-2; Note, *Promises and the Press, supra* at 1566.

Many reporters now are naming confidential sources. Langley & Levine, *supra* at 21. According to Floyd Abrams, this trend may not have been widely recognized because news organizations are reluctant to let the journalistic community know that they are breaking their promises. "There's a lot of fibbing on this," he said. *Id.*

Cowles Media's reply brief (at 13) to the Minnesota Supreme Court pointed out that the Cohen case is not unique and that other journalists "have been willing to bend or break agreements with their sources." It referred to the "several such instances" cited in its two briefs to that court. A recent article by the Cowles Media counsel listed thirty cases around the country raising issues of violations of contracts or promises by media organizations. Borger, *Publication Torts as Contracts and Misrepresentations: Redirecting Judicial Focus,* LIBEL LITIGATION 1990, 35, 69-102 (PLI 1990).

Cases raising issues of broken promises to confidential sources remain pending around the country. New York Times, July 21, 1990, at 6, col. 4; Wall Street Journal, July 23, 1990, at B2, col. 3. In other instances, according to Los Angeles Times attorney Rex Heinke, the revelation of sources "isn't reported in decisions. It just happens." Langley & Levine, *supra* at 21.

The Minnesota Supreme Court's opinion will likely have an immediate nationwide impact. One media law expert said that, even though several similar suits have been filed, "I would be surprised if this [the decision below] does not pretty much shut off the litigation in this area." Jane

Kirtley, executive director of the Reporters Committee for Freedom of the Press, quoted in Star Tribune, July 21, 1990, at 1B, col. 1.

This case presents explicitly the question of whether the First Amendment permits a media organization to deliberately violate an undisputed and unambiguous promise of confidentiality. A-9, A-11; *Ruzicka,* 733 F. Supp. at 1294.

It also has implications beyond the violation of promises. The Minnesota Supreme Court interpreted *New York Times v. Sullivan,* 376 U.S. 254 (1964), as holding that a state rule of law may not be applied "to impose impermissible restrictions" on freedom of the press. A-12 n.6. If it is impermissible to hold the press liable for dishonoring voluntary promises to obtain information, is it also to be granted a right to commit torts or crimes in gathering news?

II.

THE OPINION BELOW CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

The Minnesota Court of Appeals held that it was not "an undue burden to require the press to keep its promises." A-35. The opinion below, in contrast, would improperly aggrandize the powers of the press by sanctioning a wrongful means of gathering news. The public's interest in being informed would be disserved as well. As Justice Kelley said, the majority opinion "serves to inhibit rather than to promote the objectives of the First Amendment by 'drying up' potential sources of information on public matters." A-18.

This Court has not before accorded media organizations a constitutional privilege to break promises or contracts with others or to be immune from generally applicable laws.

A. The First Amendment.

The First Amendment does not allow the media to escape the consequences of violating promises made voluntarily with no governmental compulsion whatsoever. Unlike that of the Minnesota Court of Appeals (A28-31), the opinion below disregarded the difference between governmental coercion and private voluntary conduct. *See Board of Education of Westside Community Schools v. Mergens,* 110 S. Ct. 2356, 2372 (1990).

As the Minnesota Court of Appeals observed (A-33), this Court has held that a voluntary agreement not to publish is enforceable over claims of First Amendment rights. *Snepp v. United States,* 444 U.S. 507, 509 n.3 (1980), emphasized, "When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress."

This Court also has rejected claims of a First Amendment right to publish information received on condition of confidentiality. *Seattle Times v. Rhinehart,* 467 U.S. 20 (1984), upheld an order barring the publication of confidential information obtained through discovery. The Court held that, although there may be a public interest in knowing certain information, a newspaper does not necessarily have the right to publish it. It stressed that the newspaper gained access to the information only through a process which also placed restraints on how it could be used. "The right to speak and publish does not carry with it the unrestrained right to gather information." 467 U.S. at 32.

In holding that the First Amendment barred enforcement

of respondents' promises, the Minnesota Supreme Court relied upon *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241 (1974), which struck down a requirement that newspapers publish replies to charges against candidates. A-13. However, the present case involves no governmental compulsion over editorial judgment but, rather, the exercise of that judgment through a voluntary promise of confidentiality in return for desired information. Indeed, *Miami Herald* distinguished between consensual conduct and governmental coercion and stressed that it is the latter which implicates the First Amendment. 418 U.S. at 254.

The Minnesota Supreme Court viewed *Miami Herald* as prohibiting "second-guessing" of editors. A-13. *Herbert v. Lando,* 441 U.S. 153, 167 (1979), however, held that *Miami Herald* "neither expressly or impliedly suggest[s] that the editorial process is immune from any inquiry whatsoever."

The opinion below poses the issue of the media's obligation to obey laws which bind all others. Justice Yetka said that it "offends the fundamental principle of equality under the law" by exempting newspapers from rules by which ordinary people are bound. A-15. Decisions of this Court support him.

Branzburg v. Hayes, 408 U.S. 665, 682-3 (1972), held that the First Amendment does not invalidate the enforcement against the press of laws of general applicability despite the possible burden that may be imposed. A publisher "has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." The press "is not free to publish everything it desires to publish." There it was claimed that requiring identification of sources promised confidentiality

would impose an unconstitutional burden on news gathering. *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581-3 (1983), also stressed that states can subject newspapers to generally applicable regulations without creating constitutional problems.

A 1990 decision also rejected a claim that the First Amendment frees certain groups from laws restricting the conduct of everyone else. *Employment Div., Dept. of Human Resources v. Smith*, 110 S.Ct. 1595, 1604 (1990), held that generally applicable state laws that have the effect of burdening a particular religious practice are enforceable without the need of showing a compelling governmental interest. Allowing exceptions to rules governing the rest of society would produce "a private right to ignore generally applicable laws." Far from being required by the First Amendment, the Court declared that such a practice would be "a constitutional anomaly." The Court applied this decision in *Minnesota v. Hershberger*, 110 S.Ct. 1918 (1990).

Unlike the Minnesota Court of Appeals (A-30-31), the state Supreme Court viewed the enforcement of contracts or promises by the press as impermissible under *New York Times, supra*. A-12 n.6. *New York Times* itself made no mention of either cause of action which, contrary to unintentional defamation, involves knowing and deliberate conduct by the press. This Court has not condoned intentional or reckless misconduct even for defamation of public officials.

Instead, it has condemned the use of lies by the press as not deserving of constitutional protection. *Harte-Hanks v. Connaughton*, 109 S.Ct. 2678, 2696 n.34 (1989), held:

> Of course, the use of "calculated falsehoods" does not promote self-determination. . . . For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.

As the Minnesota Court of Appeals noted (A-36-37), the reporters who negotiated the agreement of confidentiality with Mr. Cohen anticipated that he would give them in return damaging information about a Democratic candidate. Notwithstanding the opinion below, newspapers should not have a First Amendment license to break promises given in return for information relating to political campaigns. This Court emphasized in *Harte-Hanks*, 109 S.Ct. at 2696, that it has not accorded the press absolute immunity in its coverage of elections. A promise made to obtain information on office seekers should be judged by the same rules as any other promise.

Constitutional rights are subject to waiver through agreements. *D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185-6 (1972). The opinion below failed to address at all the Minnesota Court of Appeals' analysis and holding (A-35-37) that the newspapers through their reporters' promises to petitioner waived the assertion of any First Amendment rights.

Further, allowing newspapers to break promises exchanged for facts about political candidates will, as Justice Yetka pointed out, discourage other sources from providing

material and thus reduce the amount of information made available to the public about their qualifications. A-15[3]

The publication of truthful information does not automatically confer immunity from liability. *The Florida Star v. B.J.F.*, 109 S.Ct. 2603, 2608-9, 2610 n.8, 2613 (1989), protected the publication only of lawfully obtained truthful information and refused the invitation to hold that unlawfully acquired information may not be published. The Minnesota Court of Appeals indicated that information procured through violated promises of confidentiality is not lawfully obtained. A-35.

In another context, *James v. Illinois*, 110 S.Ct. 648, 651 (1990), held that certain truthful, but illegally obtained, evidence must be excluded from criminal trials to protect people from disregard of their rights during investigations. Various rules limit the means by which government may conduct the "search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation's history." Newspapers should not be granted greater rights than judges, juries, and law enforcement officials to obtain information at any cost by violating the rights of others.

B. The Contract Clause.

In declaring unenforceable an entire category of agreements, which includes but apparently is not limited to prom-

[3]On October 29, 1982, the Pioneer Press itself published an editorial, "Relevant Disclosures," which said that "too much is being made" about the source of the disclosures about Ms. Johnson. "To focus on how the information got to the public's attention is to overlook a larger issue. That is, the information about the lieutenant governor candidate, Marlene Johnson, is something the voting public deserves to know. . . . [I]t is legitimate to examine her past as part of an assessment of her fitness for public office. . . . The last-minute disclosure could have been avoided if Mr. Perpich and Ms. Johnson had informed the public themselves earlier and confronted the issue squarely." plaintiff's ex. 29.

ises of confidentiality in exchange for information on political candidates, the opinion below also conflicts in principle with decisions of this Court regarding the Constitution's Contract Clause. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).. *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740 (Minn. 1983), cited in the opinion below (A-10), held that promises rendered binding through estoppel are entitled to the normal enforcement remedies of general contract law and are subject to the Contract Clause.

Moreover, a conventional contract also is present in this case.[4] The trial court held that the newspapers entered into and deliberately breached a contract with Mr. Cohen "where the hornbook elements of offer, acceptance, and consideration were unmistakably present." A-68. The Minnesota Court of Appeals held that an "agreement to provide information, like any other service, is an appropriate subject matter for the law of contracts." A-33. The Minnesota Supreme Court itself acknowledged the existence of an offer, an acceptance, consideration, and a breach here together with the intention by the promisors to keep their promises. A-7. Justice Kelley said that "any other corporate or private citizen of this state under similar circumstances would most certainly have been liable in damages for breach of contract." A-17.

The use of confidential sources is an essential business practice of journalism. The trial court held that a promise for confidentiality in exchange for information between a reporter and a political campaign worker is a commercial

[4]Note, *Promises and the Press*, *supra* at 1557 n. 19, assumed that a promise of confidentiality in exchange for information forms a valid contract.

arrangement and it is unreasonable to compare it, as the Minnesota Supreme Court did, to a promise involving a romantic or family relationship. A-66. Journalist, dean, and professor Elie Abel wrote, "A leak is the outcome of a transaction between reporter and source, and, like other successful transactions, it necessarily serves the interests of both parties." E. ABEL, *supra* at 62. In particular, a promise of confidentiality is "typically the price that a journalist must pay to secure meaningful information about the operation of government." Langley & Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 Geo. Wash. L. Rev. 13, 26 (1988).

Some decisions antedating *Allied Structural Steel, supra,* held that the Contract Clause only applies to legislation and not to judicial opinions. This case demonstrates, however, that a court decision can have an effect akin to statutes by invalidating a class of contracts. The First Amendment, which by its terms governs only acts of Congress, bans any offending governmental conduct; similarly, the Contract Clause should prohibit any state governmental action which nullifies contracts.

III.

THE OPINION BELOW CONFLICTS WITH DECISIONS OF OTHER JURISDICTIONS.

The opinion below conflicts with decisions of other state courts of last resort and federal courts.

Doe v. American Broadcasting Cos., 152 A.D.2d 482, 543 N.Y.S.2d 455 (1989), *appeal dismissed*, 74 N.Y.2d 945, 550 N.Y.S.2d 278, 549 N.E.2d 480 (1989), affirmed a denial of summary judgment for a claim of breach of contract alleging violation of promises that faces and voices would not be recognizable in television broadcasts.

Mayer v. State, 523 So.2d 1171, 1176 (Fla. App. 2 Dist. 1988), *review denied*, 529 So.2d 694 (Fla. 1988), upheld a contempt judgment, despite First Amendment claims, against a reporter who broke a promise not to publish information on a hearing at which a judge allowed her to be present. The decision distinguished several Supreme Court decisions on the grounds that the reporter violated conditions she expressly accepted in order to obtain the data in the first place.

A U.S. district court decision, *Huskey v. National Broadcasting Co., Inc.*, 632 F. Supp. 1282, 1292 n.15 (N.D. Ill. 1986), recognized a valid breach of contract claim where a media organization breaks an agreement not to publish information.

The failure of the opinion below to address the issue of waiver is in discord with *Erie Telecommunications, Inc. v. City of Erie, Pennsylvania*, 853 F.2d 1084, 1096-7 (3d Cir. 1988), which held that parties may waive putative First Amendment rights. *Erie* rebuked a party's attempt to withdraw from its obligations after having the benefit of full performance by the other party.

Although *Ruzicka*, 733 F. Supp. at 1297-8, 1300, granted a summary judgment on First Amendment grounds, it indicated that the Minnesota Court of Appeals properly found that the newspapers waived their claimed First Amendment rights by their agreement not to identify Mr. Cohen. It also concluded that a plaintiff seeking to enforce a reporter-source agreement would meet First Amendment requirements by the proof of specific, unambiguous terms and clear and convincing proof of breach of contract. The opinion be-

low stated that respondents' dishonored promises were "clear-cut," "without dispute," and "unambiguous." A-9, A-11.

Other recent state high court decisions not dealing specifically with broken promises have held that the First Amendment only protects the press when it gathers news in a lawful manner. *State v. Heltzel,* 552 N.E.2d 31 (Ind. 1990); *City of Oak Creek v. King,* 436 N.W.2d 285 (Wis. 1989).

In like manner, U.S. Courts of Appeals have held that the press is not immune under the First Amendment from liability for torts committed in gathering news. In upholding restrictions on a photographer's access to Mrs. Jacqueline Kennedy Onassis, *Galella v. Onassis,* 487 F.2d 986, 995-6 (2d Cir. 1973), declared, "There is no threat to a free press in requiring its agents to act within the law."

Dietemann v. Time, Inc., 449 F.2d 245, 249-50 (9th Cir. 1971), also rejected claims based upon *New York Times, supra,* that the First Amendment allows the press to commit torts or crimes in newsgathering. "Indeed, the Court strongly indicates that there is no First Amendment interest in protecting news media from calculated misdeeds." Nor should the press be immunized from liability for damages caused by the publication of facts wrongfully acquired. To do so "would encourage conduct by news media that grossly offends ordinary men."

CONCLUSION

The opinion below, affecting the widespread media practice of promising confidentiality in exchange for information, embraces a theory of the Constitution which contradicts decisions of this Court.

In upholding the jury's verdict for Mr. Cohen, Judge Knoll held that to deny an injured person recovery for demonstrated harm caused by the breach of an otherwise valid contract would deprive him of the protection of the law without any countervailing benefit to the legitimate interest of the public in being informed. A-69. Instead, it would have the opposite effect of impeding the free flow of information.

As Justice Yetka declared, no one, including the news media, should be above the law. A-16.

For the reasons stated herein, petitioner Dan Cohen respectfully requests that this Court grant a writ of certiorari in this case.

Respectfully submitted,

ELLIOT C. ROTHENBERG
Counsel for Petitioner
3901 West 25th Street
Minneapolis, MN 55416
(612) 926-8185

Dated: October 15, 1990

(2)

90-634

No. _____

IN THE

Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

Eiliot C. Rothenberg
3901 West 25th Street
Minneapolis, MN 55416
(612) 926-8185
Counsel for Petitioner

1990 — Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411 — 588-7506

90

INDEX TO APPENDIX

APPENDIX

STATE OF MINNESOTA
IN SUPREME COURT

C8-88-2631, C0-88-2672

Court of Appeals — Simonett, J.

Dissenting, Yetka, J. and Kelley, J.
Took no part, Popovich, C.J.

Dan Cohen, petitioner,
Respondent (C8-88-2631, C0-88-2672),

Filed July 20, 1990
Office of Appellate Courts

vs.

Cowles Media Company, d/b/a Minneapolis Star and Tribune Company, petitioner,
Appellant (C8-88-2631),
Defendant (C0-88-2672),

Northwest Publications, Inc., petitioner,
Defendant (C8-88-2631),
Appellant (C0-88-2672).

SYLLABUS

A state cause of action for fraudulent misrepresentation or breach of contract will not lie in this case for a newspaper's breach of its reporter's promise of anonymity given to a news source.

Affirmed in part and reversed in part.

Heard, considered, and decided by the court en banc.

OPINION

SIMONETT, Justice.

This case asks whether a newspaper's breach of its reporter's promise of anonymity to a news source is legally enforceable. We conclude the promise is not enforceable, neither as a breach of contract claim nor, in this case, under promissory estoppel. We affirm the court of appeals' dismissal of plaintiff's claim based on fraudulent misrepresentation, and reverse the court of appeals' allowance of the breach of contract claim.

Claiming a reporter's promise to keep his name out of a news story was broken, plaintiff Dan Cohen sued defendants Northwest Publications, Inc., publisher of the St. Paul Pioneer Press Dispatch (Pioneer Press), and Cowles Media Company, publisher of the Minneapolis Star and Tribune (Star Tribune). The trial court ruled that the First Amendment did not bar Cohen's contract and misrepresentation claims. The jury then found liability on both claims and awarded plaintiff $200,000 compensatory damages jointly and severally against the defendants. In addition, the jury awarded punitive damages of $250,000 against each defendant.

The court of appeals (2-1 decision) agreed that plaintiff's claims did not involve state action and therefore did not implicate the First Amendment; further, that even if First Amendment rights were implicated, those rights were outweighed by compelling state interests and, in any event, such rights were waived by the newspapers. The appeals panel ruled, however, that misrepresentation had not been proven as a matter of law and, therefore, set aside the punitive damages award. The panel upheld the jury's finding of a breach of contract and affirmed the award of $200,000

compensatory damages. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248 (Minn. App. 1989). We granted petitions for further review from all parties.

On October 27, 1982, in the closing days of the state gubernatorial election campaign, Dan Cohen separately approached Lori Sturdevant, the Star Tribune reporter, and Bill Salisbury, the Pioneer Press reporter, and to each stated in so many words:

> I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and you will also agree that you're not going to pursue with me a question of who my source is, then I'll furnish you with the documents.

Sturdevant and Salisbury were experienced reporters covering the gubernatorial election and knew Cohen as an active Republican associated with the Wheelock Whitney campaign. Cohen told Sturdevant that he would also be offering the documents to other news organizations. Neither reporter informed Cohen that their promises of confidentiality were subject to approval or revocation by their editors. Both reporters promised to keep Cohen's identity anonymous, and both intended to keep that promise. At trial Cohen testified he insisted on anonymity because he feared retaliation from the news media and politicians. Cohen turned over to each reporter copies of two public court records concerning Marlene Johnson, the DFL candidate for lieutenant governor. The first was a record of a 1969 case against Johnson for three counts of unlawful

assembly, subsequently dismissed; the second document was a 1970 record of conviction for petit theft, which was vacated a year later.[1]

Both newspapers, on the same day, then interviewed Marlene Johnson for her explanation and reaction. The Star Tribune also assigned a reporter to find the original court records in the dead-storage vaults. The reporter discovered that Gary Flakne, known to be a Wheelock Whitney supporter, had checked out the records a day earlier; no one, before Flakne, had looked at the records for years. The reporter called Flakne and asked why he had checked out the records. Flakne replied, "I did it for Dan Cohen." The Star Tribune editors thereafter conferred and decided to publish the story the next day including Dan Cohen's identity. Acting independently, the Pioneer Press Dispatch editors also decided to break their reporter's promise and to publish the story with Cohen named as the source.[2]

The decision to identify Cohen in the stories was the subject of vigorous debate within the editorial staffs of the two newspapers. Some staff members argued that the reporter's promise of confidentiality should be honored at all costs.

[1]Cohen then met with reporters for the Associated Press and WCCO-TV. They, too, promised Cohen anonymity and received the court documents. The Associated Press published the story and honored its promise. WCCO-TV did not run the story.

[2]The court records obtained by Cohen did not contain the underlying facts of the unlawful assembly and petit theft charges. Apparently only after the reporters had gone to Johnson for an explanation did the full story become known. Johnson explained (and the newspapers duly reported in their stories) that the arrest for unlawful assembly (later dismissed) was for protesting the city's alleged failure to hire minority workers on construction projects, while the petit theft incident (theft up to $150) was for leaving a store with $6 of sewing materials at a time when Johnson was upset because of her father's death. These circumstances, of which Cohen was apparently unaware and which cast a somewhat different light on the two incidents, were likely to set in motion a boomerang effect. This suggestion of a boomerang may have prompted some of the editors to believe that Cohen's identity was newsworthy.

Some contended that the Johnson incidents were not newsworthy and did not warrant publishing, and, in any case, if the story was published, it would be enough to identify the source as a source close to the Whitney campaign. Other editors argued that not only was the Johnson story newsworthy but so was identification of Cohen as the source; that to attribute the story to a veiled source would be misleading and cast suspicion on others; and that the Johnson story was already spreading throughout the news media community and was discoverable from other sources not bound by confidentiality. Then, too, the Star Tribune had editorially endorsed the Perpich-Johnson ticket; some of its editors feared if the newspaper did not print the Johnson story, other news media would, leaving the Star Tribune vulnerable to a charge it was protecting the ticket it favored. Salisbury and Sturdevant both objected strongly to the editorial decisions to identify Cohen as the source of the court records. Indeed, Sturdevant refused to attach her name to the story.

Promising to keep a news source anonymous is a common, well-established journalistic practice. So is the keeping of those promises. None of the editors or reporters who testified could recall any other instance when a reporter's promise of confidentiality to a source had been overruled by the editor. Cohen, who had many years' experience in politics and public relations,[3] said this was the first time in his experience that an editor or a reporter did not honor a promise to a source.

[3]Cohen would qualify as a public figure. For many years Cohen had been active in politics as a campaign worker, a candidate, and as an elected public official. In 1982 he was a Whitney supporter and was employed as a public relations officer with a Minneapolis advertising firm which was handling some work for the Whitney campaign. Additionally, he had been a lawyer, stock broker, public relations official, author, and freelance newspaper columnist.

The next day, October 28, 1982, both newspapers published stories about Johnson's arrests and conviction. Both articles published Cohen's name, along with denials by the regular Whitney campaign officials of any connection with the published stories. Under the headline, *Marlene Johnson arrests disclosed by Whitney ally*, the Star Tribune also gave Johnson's explanation of the arrests and identified Cohen as a "political associate of IR gubernatorial candidate Wheelock Whitney" and named the advertising firm where Cohen was employed. The Pioneer Press Dispatch quoted Johnson as saying the release of the information was "a last-minute smear campaign."

The same day as the two newspaper articles were published, Cohen was fired by his employer. The next day, October 29, a columnist for the Star Tribune attacked Cohen and his "sleazy" tactics, with, ironically, no reference to the newspaper's own ethics in dishonoring its promise. A day later the Star Tribune published a cartoon on its editorial page depicting Dan Cohen with a garbage can labeled "last minute campaign smears."

Cohen could not sue for defamation because the information disclosed was true. He couched his complaint, therefore, in terms of fraudulent misrepresentation and breach of contract. We now consider whether these two claims apply here.

I.

First of all, we agree with the court of appeals that the trial court erred in not granting defendants' post-trial motions for judgment notwithstanding the verdict on the misrepresentation claim.

For fraud there must be a misrepresentation of a past or present fact. A representation as to future acts does not

support an action for fraud merely because the represented act did not happen, unless the promisor did not intend to perform at the time the promise was made. *Vandeputte v. Soderholm*, 298 Minn. 505, 508, 216 N.W.2d 144, 147 (1974). Cohen admits that the reporters intended to keep their promises, as, indeed, they testified and as their conduct confirmed. Moreover, the record shows that the editors had no intention to reveal Cohen's identity until later when more information was received and the matter was discussed with other editors. These facts do not support a fraud claim. For this reason and for the other reasons cited by the court of appeals, we affirm the court of appeals' ruling. Because the punitive damages award hinges on the tort claim of misrepresentation, it, too, must be set aside as the court of appeals ruled.

II.

A contract, it is said, consists of an offer, an acceptance, and consideration. Here, we seemingly have all three, plus a breach. We think, however, the matter is not this simple.

Unquestionably, the promises given in this case were intended by the promisors to be kept. The record is replete with the unanimous testimony of reporters, editors, and journalism experts that protecting a confidential source of a news story is a sacred trust, a matter of "honor," of "morality," and required by professional ethics. Only in dire circumstances might a promise of confidentiality possibly be ethically broken,[4] and instances were cited where

[4]Two possible instances where a promise of confidentiality might be ethically breached have been suggested: (1) where disclosure is required to correct misstatements made by the source; and (2) where failure to reveal the source may subject the newspaper to substantial libel damages. *See* M. Langley & L. Levine, *Broken Promises*, Colum. Journalism

a reporter has gone to jail rather than reveal a source. The keeping of promises is professionally important for at least two reasons. First, to break a promise of confidentiality which has induced a source to give information is dishonorable. Secondly, if it is known that promises will not be kept, sources may dry up. The media depend on confidential sources for much of their news; significantly, at least up to now, it appears that journalistic ethics have adequately protected confidential sources.

The question before us, however, is not whether keeping a confidential promise is ethically required but whether it is legally enforceable; whether, in other words, the law should superimpose a legal obligation on a moral and ethical obligation. The two obligations are not always coextensive.

The newspapers argue that the reporter's promise should not be contractually binding because these promises are usually given clandestinely and orally, hence they are often vague, subject to misunderstanding, and a fertile breeding ground for lawsuits. *See Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1300-01 (D. Minn. 1990) (a promise not to make a source identifiable found too vague to be enforceable). Perhaps so, and this may be a factor to weigh in the balance; but this objection goes only to problems of proof, rather than to the merits of having such

Rev. 21 (July/August 1988). As an example of the first instance, the authors cite Oliver North's public hearing testimony that the leaking of information about the *Achille Lauro* hijacking seriously compromised intelligence activities, whereupon Newsweek disclosed that North himself was the anonymous source of the leak. *Id.* In some civil libel actions, says the article, where the reporter refuses to reveal his or her confidential source of allegedly defamatory information, the court has threatened to enter a default judgment against the defendant newspaper, thereby exposing the newspaper to heavy damages. *Id.* at 22.

Another difficulty sometimes encountered is that the newspaper, being free to state who is *not* the confidential source, may enable members of the public, by a process of elimination, to identify the source. *Id.*

a cause of action at all. Moreover, in this case at least, we have a clear-cut promise.

The law, however, does not create a contract where the parties intended none. *Linne v. Ronkainen*, 228 Minn. 316, 320, 37 N.W.2d 237, 239 (1949). Nor does the law consider binding every exchange of promises. *See, e.g.*, Minn. Stat. ch. 553 (1988) (abolishing breaches of contract to marry); *see also* Restatement (Second) of Contracts §§ 189-91 (1981) (promises impairing family relations are unenforceable). We are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract. They are not thinking in terms of offers and acceptances in any commercial or business sense. The parties understand that the reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract. *See Cruickshank v. Ellis*, 178 Minn. 103, 107, 226 N.W. 192, 194 (1929). Indeed, a payment of money which taints the integrity of the newsgathering function, such as money paid a reporter for the publishing of a news story, is forbidden by the ethics of journalism.

What we have here, it seems to us, is an "I'll-scratch-your-back-if-you'll-scratch-mine" accommodation. The source, for whatever reasons, wants certain information published. The reporter can only evaluate the information after receiving it, which is after the promise is given; and the editor can only make a reasonable, informed judgment after the information received is put in the larger context of the news. The durability and duration of the confidence is usually left unsaid, dependent on unfolding developments; and none of the parties can safely predict the consequences of

publication. *See supra* note 4. Each party, we think, assumes the risks of what might happen, protected only by the good faith of the other party.

In other words, contract law seems here an ill fit for a promise of news source confidentiality. To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship. We conclude that a contract cause of action is inappropriate for these particular circumstances.

III.

But if a confidentiality promise is not a legally binding contract, might the promise otherwise be enforceable? In *Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d 740, 747 (Minn. 1983), we declined to apply a "conventional contract approach, with its strict rules of offer and acceptance" in the context of public pension entitlements, pointing out this approach "tends to deprive the analysis of the relationship between the state and its employees of a needed flexibility." We opted instead for a promissory estoppel analysis. The doctrine of promissory estoppel implies a contract in law where none exists in fact. According to the doctrine, well-established in this state, a promise expected or reasonably expected to induce definite action by the promisee that does induce action is binding if injustice can be avoided only by enforcing the promise.[5]

[5] *AFSCME Councils 6, 14, 65 and 96, AFL-CIO v. Sundquist*, 338 N.W.2d 560, 568 (Minn. 1983), *appeal dismissed, Minneapolis Police Relief Ass'n v. Sundquist*, 466 U.S. 933 (1984); *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981) (a health clinic reneging on a job offer to a pharmacist who had quit his job and turned down another job in reliance on the clinic's offer); *Northwestern Bank of*

In our case we have, without dispute, the reporters' unambiguous promise to treat Cohen as an anonymous source. The reporters expected that promise to induce Cohen to give them the documents, which he did to his detriment. The promise applied only to Cohen's identity, not to anything about the court records themselves.

We are troubled, however, by the third requirement for promissory estoppel, namely, the requirement that injustice can only be avoided by enforcing the promise. Here Cohen lost his job; but whether this is an injustice which should be remedied requires the court to examine a transaction fraught with moral ambiguity. Both sides proclaim their own purity of intentions while condemning the other side for "dirty tricks." Anonymity gives the source deniability, but deniability, depending on the circumstances, may or may not deserve legal protection. If the court applies promissory estoppel, its inquiry is not limited to whether a promise was given and broken, but rather the inquiry is into all the reasons why it was broken.

Lurking in the background of this case has been the newspapers' contention that any state-imposed sanction in this case violates their constitutional rights of a free press

Commerce v. Employers' Life Ins. Co. of America, 281 N.W.2d 164, 166 (Minn. 1979) (a life insurer breaching a promise to notify a bank, which had taken the policy as collateral, of a default on premiums, resulting in lapse of the policy); *see also* Restatement (Second) of Contracts § 90(1) (1981). The measure of damages also appears to be more flexible than for breach of contract. ("The remedy granted for breach may be limited as justice requires." *Id.*)

This theory was not briefed by the parties but it surfaced during oral argument.

and free speech.[6] Under the contract analysis earlier discussed, the focus was more on whether a binding promise was intended and breached, not so much on the contents of that promise or the nature of the information exchanged for the promise. *See* Restatement (Second) of Contracts, ch. 8, introductory note (1981) ("In general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance."). Thus the court of appeals, using a contract approach, concluded that applying "neutral principles" of contract law either did not trigger First Amendment scrutiny or, if it did, the state's interest in freedom of contract outweighed any constitutional free press rights. 445 N.W.2d at 254-57.[7] Because we decide that contract law does not apply, we have not up to now had

[6]*New York Times v. Sullivan*, 376 U.S. 254 (1964), holds that a state may not apply a state rule of law to impose impermissible restrictions on the federal constitutional freedoms of speech and press. The test is not the form which the state action takes—such as in this case, breach of contract or promissory estoppel—but, "whatever the form, whether such power has in fact been exercised." *Id.* at 265.

The defendant newspapers rely on *New York Times* and its progeny, plus *Shelley v. Kraemer*, 334 U.S. 1 (1948), where state law enforcement of a private covenant was held to violate constitutional rights of third parties. Plaintiff, on the other hand, relies on cases such as *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Snepp v. United States*, 444 U.S. 507 (1980); and *The Florida Star v. B. J. F.*, — U.S. —, 109 S.Ct. 2603 (1989), to make his argument that there are occasions where the First Amendment allows restraints on true information, especially when the restraint was voluntarily assumed by the newspaper or when the information was "unlawfully obtained" by the newspaper.

[7]The doctrine of "neutral principles," for example, has been used to permit state contract and property law to decide ownership of church property when church members are divided over doctrine, notwithstanding the First Amendment prohibition against state entanglement in religion. *See Jones v. Wolf*, 443 U.S. 595, 603-04 (1979); *but cf. Kaufmann v. Sheehan*, 707 F.2d 355, 358-59 (8th Cir. 1983) (plaintiff's employment as a priest, while having secular aspects, involved "inherently religious issues" to be left to church authorities). Even so, as the Restatement goes on to say in the passage quoted above in the text, there may be instances where "the interest in freedom of contract is outweighed by some overriding interest of society * * *." Restatement (Second) of Contracts, ch. 8, introductory note (1981).

to consider First Amendment implications. But now we must. Under a promissory estoppel analysis there can be no neutrality towards the First Amendment. In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated. The court must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity.

For example, was Cohen's name "newsworthy"? Was publishing it necessary for a fair and balanced story? Would identifying the source simply as being close to the Whitney campaign have been enough? The witnesses at trial were sharply divided on these questions. Under promissory estoppel, the court cannot avoid answering these questions, even though to do so would mean second-guessing the newspaper editors. *See, e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper * * * constitute[s] the exercise of editorial control and judgment," a process critical to the First Amendment guarantees of a free press). Of critical significance in this case, we think, is the fact that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign. The potentiality for civil damages for promises made in this context chills public debate, a debate which Cohen willingly entered albeit hoping to do so on his own terms. In this context, and considering the nature of the political story involved, it seems to us that the law best leaves the parties here to their trust in each other.

We conclude that in this case enforcement of the promise

of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights. In cases of this kind, the United States Supreme Court has said it will proceed cautiously, deciding only in a "discrete factual context." *The Florida Star v. B.J.F.*, — U.S. —, —, 109 S.Ct. 2603, 2607 (1989). We, too, are not inclined to decide more than we have to decide. There may be instances where a confidential source would be entitled to a remedy such as promissory estoppel, when the state's interest in enforcing the promise to the source outweighs First Amendment considerations, but this is not such a case. Plaintiff's claim cannot be maintained on a contract theory. Neither is it sustainable under promissory estoppel. The judgment for plaintiff is reversed.

Affirmed in part and reversed in part.

POPOVICH, Chief Justice, while presiding at oral argument, took no part in the consideration and decision of this matter.

Cohen v. Cowles Media Co.

YETKA, Justice (dissenting).

I would affirm the court of appeals and allow Cohen to recover on either a contract or promissory estoppel theory. The simple truth of the matter is that the appellants made a promise of confidentiality to Cohen in consideration for information they considered newsworthy. That promise was broken and, as a direct consequence, Cohen lost his job. Under established rules of contract law, the appellants should be responsible for the consequences of that broken promise. The first amendment is being misused to avoid liability under the doctrine of promissory estoppel. The result of this is to

carve out yet another special privilege in favor of the press that is denied other citizens.

I dissent because I believe that the news media should be compelled to keep their promises like anyone else. If they did not intend to keep the promise they made to Cohen, they should not have made it or should have refused to use the proffered information. Alternatively, after accepting the information subject to the confidentiality agreement, the press could have printed the story without revealing the source or could have simply attributed the source to "someone close to the Whitney campaign" without revealing Cohen's name.

I find the consequences of this decision deplorable. First, potential news sources will now be reluctant to give information to reporters. As a result, the public could very well be denied far more important information about candidates for public office relevant to evaluating their qualifications than the rather trivial infractions disclosed here. Second, it offends the fundamental principle of equality under the law.

This decision sends out a clear message that if you are wealthy and powerful enough, the law simply does not apply to you; contract law, it now seems, applies only to millions of ordinary people. It is unconscionable to allow the press, on the one hand, to hide behind the shield of confidentiality when it does not want to reveal the source of its information; yet, on the other hand, to violate confidentiality agreements with impunity when it decides that disclosing the source will help make its story more sensational and profitable. During the Watergate crisis, the press published many pious editorials urging that the laws be enforced equally against everyone, even the President of the United

States. Nevertheless, the press now argues that the law should not apply to them because they alone are entitled to make "editorial decisions" as to what the public should read, see, or hear and whether the source of that information should be disclosed.

The decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), has not resulted in a more responsible press. In the 19th century, the phrases "scandal sheet" and "yellow journalism" became common adjectives for disreputable publications. It would be tragic if these colorful descriptions regained popular usage because of the practices of a few of the more sensational "journalistic" enterprises which appear to be growing in number and popularity, replacing the great newspapers of the past.

Perhaps it is time in these United States to return to treating the press the same as any other citizen. Let them print anything they choose to print, but make them legally responsible if they break their promises or act negligently in connection with what they print — free of any special protection carved out by *New York Times v. Sullivan* or any of its progeny. The decision of this court makes this a sad day in the history of a responsible press in America. Because I firmly believe that no one should be above the law, including the President of the United States or the news media, I would affirm the court of appeals.

KELLEY, Justice (dissenting).

A majority of this court recently held that a commercial media defendant, who the jury found had done a "hatchet job" with constitutional malice on a public official through distortion and/or omission of established facts and through

unwarranted inference, was immune from tort liability, unlike the rest of the citizens of this state, corporate or private, who would undoubtedly be liable in tort for that type of conduct. I joined the dissent of Justice Yetka in that case. *Diesen v. Hessburg*, 455 N.W.2d 446 (Minn. 1990) (Petition to withdraw pending). In my opinion, the majority today, applying a somewhat different analysis, affords to that same commercial media immunity from liability from an unmistakable breach of contract, although any other corporate or private citizen of this state under similar circumstances would most certainly have been liable in damages for breach of contract.

While I agree with the majority that the trial court erred in not granting the defendants' post-trial motions for judgment notwithstanding the verdict on the misrepresentation claim, I remain unpersuaded by the majority's analysis that, notwithstanding that all of the elements of a legal contract and its breach are here present, the contract is unenforceable because "the parties intended none." It reaches this conclusion even as it concedes that the promises given by the agents and employees of these defendants was intended by them to be kept. *Majority Op.* at 6. Rather than affording Cohen a remedy for the considerable damage he sustained, see Art. I, § 8, Constitution of Minnesota, the majority, it seems to me, engaged in or came very close to engaging in some inappropriate appellate fact finding, to-wit, that each of the parties did not intend a contract and assumed the risk "of what might happen." I conclude that the analysis employed by Judge Short in the majority opinion of the court of appeals, *Cohen v. Cowles Media Co.*, 445 N.W.2d 248 (Minn. App. 1989), correctly sets forth the applicable contract law governing the transaction between Cohen and employees and agents of these media defendants.

Therefore, I adopt it as my dissent here. I likewise join the dissent of Justice Yetka which highlights the perfidy of these defendants, the liability for which they now seek to escape by trying to crawl under the aegis of the First Amendment, which, in my opinion, has nothing to do with the case.[1] Today's decision serves to inhibit rather than to promote the objectives of the First Amendment by "drying up" potential sources of information on public matters. I dissent.

---

[1]These media defendants now advance a First Amendment argument based upon the "public's right to know." I suggest to do so is indeed ironical when considered in the light of the extensive efforts of each to promote enactment of Minnesota Statutes Sections 595.021 to 595.025, the Minnesota Free Flow of Information Act, sometimes popularly referred to as the Reporter's Shield Act. This statute protects the news media from compelled disclosure of sources in court and other proceedings. Ralph Bailey, editor of the Minneapolis Tribune, urged passage of a similar companion bill before the Judicial Administration Subcommittee of the Senate Judiciary Committee on March 30, 1973, as did an attorney-lobbyist for the St. Paul and Duluth newspapers. That same attorney-lobbyist and John Finnegan, Executive Editor, St. Paul Dispatch, appeared and testified at a meeting of the Judiciary Committee of the House of Representatives on March 1, 1973, and again later on March 14, 1973. Both participated in discussion of amendments to the proposed bill (House File 624), which ultimately was passed and is now codified as Minnesota Statutes Sections 595.021 - 595.025. Although minimal amendments to these statutes were made in 1981, 1983, and 1986, they did not change the basic substance of the statute. Thus, the Minnesota Free Flow of Information Act, when combined with today's decision, with few tightly circumscribed exceptions, leaves the "public's right to know and protection of confidential sources," not with the peoples' representatives — the legislature and the courts — but rather with the executives of the commercial media.

STATE OF MINNESOTA
IN COURT OF APPEALS

C8-88-2631
C0-88-2672

Hennepin County — Short, Judge
Concurring in part, dissenting in part, Crippen, Judge

Dan Cohen,

Respondent (C8-88-2631),
Respondent (C088-2672),

Elliot C. Rothenberg
3901 West 25th Street
Minneapolis, MN 55416

vs.

Cowles Media Company,
d/b/a Minneapolis Star
and Tribune Company,

Appellant (C8-88-2631),
Defendant (C0-88-2672),

James Fitzmaurice
John Borger
Andrew S. Dunne
Faegre & Benson
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402

Patricia A. Longstaff
425 Portland Avenue South
Minneapolis, MN 55488

Of Counsel:
Norton L. Armour
Cowles Media Company
425 Portland Avenue South
Minneapolis, MN 55488

Northwest Publications, Inc.,
Defendant (C8-88-2631),
Appellant (C0-88-2672).

Paul R. Hannah
Suite 1122, Pioneer Building
336 Robert Street
St. Paul, MN 55101

Of Counsel:
Richard J. Ovelmen
Landon K. Clayman
Baker & McKenzie
701 Brickell Avenue
Miami, FL 33131

Filed: September 5, 1989
Office of Appellate Courts

SYLLABUS

The first amendment does not bar a contract action by a confidential source against newspapers for publication of the source's name. While the breach of contract claim is supported by the record, the source's claims of misrepresentation and punitive damages are not appropriate because the newspapers' promises of confidentiality contained no material misrepresentations or omissions.

Affirmed in part and reversed in part.

Heard, considered and decided by Short, Presiding Judge, Crippen, Judge, and Schultz, Judge.*

OPINION

SHORT, Judge

Cowles Media Company, d/b/a Minneapolis Star and Tribune (Tribune) and Northwest Publications, Inc. (Dispatch), appeal the trial court's judgment awarding Cohen $200,000 in compensatory damages and $500,000 in punitive damages. This action arises out of the newspapers' publication of Cohen's name after reporters employed by the newspapers had promised Cohen that his name would not be published. The trial court concluded that the first amendment did not bar Cohen's breach of contract and misrepresentation claims and submitted those claims to the jury. The jury returned a verdict in favor of Cohen. The trial court denied the newspapers' alternative motions for judgment notwithstanding the verdict and a new trial. On appeal, the newspapers argue that the trial court erred in (1) ignoring the protection afforded the press by the first amendment, (2) instructing the jury with respect to Cohen's contract claim, (3) submitting the issue of fraud to the jury, (4) submitting the issue of punitive damages to the jury, and (5) admitting irrelevant and prejudicial evidence regarding other Tribune publications. We affirm the judgment on the breach of contract claim, but reverse as to the claims for misrepresentation and punitive damages.

FACTS

In the fall of 1983, respondent Dan Cohen was the director of public relations for an advertising agency. That

*Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

agency was handling the advertising for the campaign of Wheelock Whitney, the Independent Republican (IR) gubernatorial candidate. Cohen was a long-time and well-known IR supporter. One week before the gubernatorial elections, Gary Flakne, a former IR legislator and county attorney, unearthed documents which demonstrated that the Democratic-Farmer-Labor (DFL) candidate for lieutenant governor Marlene Johnson, had been arrested in 1969 for unlawful assembly (that charge was later dropped) and arrested and convicted of petty theft in 1970 (that conviction was vacated in 1971). Flakne scheduled a meeting with several IR supporters for October 27 to discuss release of these documents to the media. Cohen attended this meeting.

At the meeting, the group decided that Cohen should be the person to release the documents because he had the best rapport with the local media. The group further discussed and agreed that Cohen should retain anonymity in releasing the information. Cohen immediately contacted four journalists: Lori Sturdevant of the Tribune; Bill Salisbury of the Dispatch; Gerry Nelson of the Associated Press; and David Nimmer of WCCO Television. He reached all but Nimmer by telephone and said:

> I have some material which may or may not relate to the upcoming statewide election. And assuming that we can reach an agreement as to the basis on which I would provide this material to you. I will provide it.

All three reporters agreed to meet with him.

Later that morning, Cohen met separately with Sturdevant and Salisbury in the State Capitol building news office. He made the following proposal to each reporter.

> I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and that you will also agree that you're not going to pursue with me a question of who my source is, then I will furnish you with the documents.

Sturdevant promptly and unequivocally agreed to Cohen's proposal. Cohen then gave her copies of the documents, and she allegedly said, "This is the sort of thing that I'd like to have you bring by again if you ever have anything like it." Sturdevant then asked Cohen if she had this information on an exclusive basis. Cohen said "No." Sturdevant did not protest or express any dissatisfaction with this non-exclusive arrangement.

Salisbury also agreed immediately to Cohen's proposal regarding anonymity. After reviewing the papers Cohen had given him, Salisbury described them as "political dynamite." The issue of exclusivity was never discussed between Cohen and Salisbury.

Cohen then met separately with Nelson and Nimmer. The same proposal was made to each reporter and was accepted by each. After securing the promise of confidentiality, Cohen delivered the documents.

Thereafter, Cohen returned to work and informed his supervisor that he had supplied the documents to the media. Cohen testified that his supervisor had no reaction as to his disclosure. The supervisor, however, testified at trial that he was upset by what he believed were Cohen's unscrupulous practices.

Sturdevant immediately reported the information she had received from Cohen to her supervisor. The Tribune editors

assigned four or five reporters to follow up on the story and to contact members of the two gubernatorial campaigns. A reporter, who was directed to verify the authenticity of the court records, discovered Gary Flakne's name on the list of persons having recently reviewed the records. The reporter contacted Flakne and asked Flakne for whom he had obtained those documents. Flakne told the reporter that he had obtained the documents for Cohen.

The Tribune editor who had the ultimate say in whether to run the story convened a "huddle" sometime around 3:00 p.m. to discuss the handling of the information. That group decided that if the Tribune did not run the story, the paper could be accused of suppressing information damaging to the DFL party. They also discussed simply publishing the information on the arrest and conviction and honoring the promise to Cohen. The group considered it unsatisfactory to describe the source as a Whitney supporter, a Whitney campaign member, or a prominent Independant Republican. The Tribune had never before dishonored a reporter-source agreement.

Sturdevant, who was not a part of the "huddle" and had no other input into whether the story was reported, was asked by her editors to see whether Cohen would release the Tribune from its promise of anonymity. Sturdevant expressed her adamant objection to dishonoring the promise to Cohen and she demanded that her name not appear on the article should it be published. She nevertheless agreed to write the article and to ask Cohen to release the Tribune from its promise. She telephoned Cohen two or three times, but each time Cohen refused to agree to have his name published. Finally, the Tribune decided to run the story disclosing Cohen's identity. Sturdevant then contacted

Cohen to inform him of the situation and he said if his name was to be published, he wanted to make the following statement:

> The voters of this state are entitled to know that kind of information. Every day Perpich and Johnson failed to reveal it to them, they were living a lie.

On October 28, 1982, the Tribune ran an article appearing on the bottom half of the front page, entitled "Marlene Johnson Arrests Disclosed by Whitney Ally." Pursuant to Sturdevant's demand, the article was attributed to "Staff Writer." The article disclosed Johnson's arrests and conviction, and named Cohen as the source of the information. The article also revealed that Cohen was employed by the agency handling the advertising for the IR gubernatorial campaign. The article did not mention Sturdevant's promise of anonymity to Cohen.

In contrast to the manner in which the Tribune handled the matter, the Dispatch editors did not engage in involved deliberations before deciding to disclose Cohen's identity. Salisbury also objected to dishonoring his promise to Cohen. However, he did not object to his name appearing on the article. The Dispatch ran an article similar to the Tribune's in both Dispatch editions on October 28. The articles appeared in the local news sections, disclosed the convictions and arrests, and identified Cohen as the source. This occasion was the first time that the Dispatch had dishonored a reporter's promise to keep a source confidential. While the articles stated that Cohen asked that his name not be used, they failed to disclose that a Dispatch reporter had promised to keep Cohen's name confidential. Unlike the Tribune article, however, the Dispatch articles did not mention the name of Cohen's employer.

The Associated Press honored its reporter's promise to Cohen by stating that court documents relating to the arrests and conviction "were slipped to reporters." WCCO-TV also honored its reporter's promise by deciding not to broadcast the story at all.

Later in the day on October 28, after learning that Cohen's name and employment had been published in connection with the story, Cohen's employer confronted him and a heated discussion ensued. According to Cohen, that discussion ended with his being fired. According to Cohen's employer, Cohen resigned. The newspapers do not now dispute that Cohen was fired or otherwise forced to resign as a result of the story.

On October 29, the Tribune published a column criticizing Cohen for his self-righteousness and unfair campaign tactics. On October 30, the Tribune ran an editorial cartoon depicting a trick-or-treater outfitted as a garbage can knocking on the door of the DFL headquarters. The garbage can was labeled "Last minute campaign smears," and governor Rudy Perpich was opening the door, stating, "It's Dan Cohen."

Sometime during the week beginning October 31, Flakne wrote to the editor of the Dispatch criticizing both newspapers for their breach of the reporter-source agreement with Cohen. On November 7, four days after the election, the Dispatch printed Flakne's letter on its editorial page. That same day, the Tribune ran a more edited version of Flakne's letter along with an article explaining why the newspaper had overridden its reporter's promise to Cohen.

Cohen subsequently commenced this breach of contract and misrepresentation action, seeking both compensatory and punitive damages. The jury found that both newspapers

had entered into binding contracts with Cohen and that they breached those contracts. The jury further found that both newspapers made material misrepresentations of fact to Cohen. The jury awarded Cohen $200,000 in compensatory damages and $500,000 in punitive damages.

The newspapers alternatively moved for judgment notwithstanding the verdict or a new trial, alleging numerous trial court errors. The trial court denied these motions and entered judgment. The Tribune and the Dispatch separately appealed the judgment, and we consolidated the appeals.

ISSUES

I. Did the trial court err in concluding that the first amendment does not bar an action for breach of contract against the newspapers for their disclosure of Cohen's name, even though such disclosure was truthful and newsworthy?

II. Did the trial court err in instructing the jury with respect to Cohen's contract claim?

III. Did the trial court err in denying the newspapers' motions for judgment notwithstanding the verdict on the misrepresentation claim?

IV. Did the trial court err in submitting the issue of punitive damages to the jury?

V. Did the trial court commit reversible error in admitting other Tribune publications into evidence?

ANALYSIS

I.

The trial court correctly concluded that the first amendment does not bar Cohen's contract claim. There is no state action, the alleged first amendment rights do not outweigh the governmental interests, and the newspapers knowingly waived their first amendment rights.

A. *State Action*

We believe that there is no state action present in this case to trigger first amendment scrutiny. The first amendment prohibits the government from making laws "abridging the freedom of speech, or of the press." U.S. Const. amend. I. The first amendment bars only government action that restricts free speech or press freedom. *Public Utilities Commission of District of Columbia v. Pollak*, 343 U.S. 451, 461 (1952).

The United States Supreme Court has repeatedly held in a variety of contexts that the neutral application of state laws is not state action. *See Tulsa Professional Collection Services, Inc. v. Pope*, — U.S. —, —, 108 S. Ct. 1340, 1345 (1988) (private use of state sanctioned private remedies or procedures does not rise to level of state action); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 163 (1978) (action pursuant to state law is not state action); *Evans v. Abney*, 396 U.S. 435, 446 (1970) (operation of neutral and nondiscriminatory state trust laws does not constitute state action). The decisions of other federal courts are in accord. *See Peters v. United States*, 694 F.2d 687, 697 (Fed. Cir. 1982) (modification of contract to which government is a party is not state action); *Warren v. Government*

National Mortgage Association, 611 F.2d 1229, 1234 (8th Cir. 1980) (extrajudicial foreclosure pursuant to power of sale terms of the deed of trust performed in accordance with state law is not state action), *cert. denied*, 449 U.S. 847 (1980); *Doe v. Keane*, 658 F. Supp. 216, 220-21 (W.D. Mich. 1987) (exercise of a choice allowed by state law, where initiative comes from private actor and not from state, cannot make private act a state act); *Price v. International Union, United Automobile Aerospace & Agricultural Implement Workers of America*, 621 F. Supp. 1243, 1250 (D. Conn. 1985) (court intervention is possible in any suit on a contract and does not in itself constitute state action merely because free speech may be curtailed); *International Society for Krishna Consciousness, Inc. v. Reber*, 454 F. Supp. 1385, 1388-89 (C.D. Cal. 1978) (use of state trespass laws to enforce private property rights is not state action). Only when private parties make use of state procedures with the overt, significant assistance of state officials, has the United States Supreme Court found state action to be present. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

We do not doubt that court action can constitute state action in some circumstances. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Supreme Court held state enforcement of a racially restrictive covenant was state action prohibited by the fourteenth amendment. In that case, third parties, aided by the courts, were preventing the sale of real property by enforcing racially restrictive covenants. *Id.* at 18. Under these circumstances, the state courts' conduct was "active intervention." *Id.* at 19. By actively perpetuating the denial of black people's property rights, the courts were defeating the basic objective of the fourteenth amendment.

Although the language of *Shelley* is expansive, we believe it does not stand for the proposition that application of neutral common law rules is always state action. The Supreme Court held in *Evans*, for example, that "the operation of neutral and nondiscriminatory state trust laws" did not constitute state action for purposes of the fourteenth amendment. 396 U.S. at 446. In *Evans*, the alleged state action was the application of neutral rules of construction designed to determine the intent of the testator. The Court held that such action does not violate the fourteenth amendment. *Id.*

Thus, the issue this court faces is whether the application of neutral principles of contract law to a promise not to publish the source of information is state action which triggers first amendment scrutiny. We believe the rule in *Evans* more closely fits our situation, and therefore hold no state action is present. The court here was not engaging in "active intervention" at the request of third parties, as was the case in *Shelley*. Rather, the parties themselves made the agreement without involvement by the state. The enforcement of the contract is not impermissible state involvement in the denial of a constitutional right. Rather, the state is enforcing an agreement between private parties who have bargained for the content of published information. In these circumstances, the parties' agreement, even with ultimate state enforcement, is not deserving of first amendment scrutiny.

The Supreme Court held in *New York Times v. Sullivan*, 376 U.S. 254 (1964), that application of state defamation law to a newspaper was state action. *Id.* at 265. We believe the rule in *New York Times* has little relevance to an action brought under contract law. Defamation law inherently

limits the content of speech. Speech which meets the elements of the defamation tort and the malice requirements of *New York Times* may be sanctioned by damage awards enforced by the courts. Contract law is, we believe, fundamentally different. The rules of contract law do not sanction any particular speech. The parties themselves chose the speech or conduct they wished to be the subject matter of the contract. An award of contract damages, therefore, does not sanction the words or conduct themselves, but rather the failure to honor a promise. Because the action of the court is not suppression of speech, it is not state action of the type at issue in *New York Times*. Thus, we conclude that the application of neutral contract principles to a private party's agreement to suppress speech is not state action, and does not require first amendment scrutiny.

B. *Weighing of Competing Interests*

Assuming that this civil contract suit may nonetheless constitute state action, the first amendment still did not relieve the newspapers of the obligation they had to honor the terms of their contract with Cohen. The United States Supreme Court has adopted a balancing test to determine whether official action which has adverse or chilling effects on speech violates the first amendment. *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 582 (1983); *Branzburg v. Hayes*, 408 U.S. 665, 680-81 (1972). A burden on first amendment rights is justified only if necessary to achieve an overriding governmental interest. *Minneapolis Star & Tribune Co.*, 460 U.S. at 582.

The Supreme Court has found a variety of permissible burdens on the press. For example, the first amendment does

not invalidate the application of civil or criminal laws to members of the press despite the burden on press freedom which their application may impose. *Branzburg*, 408 U.S. at 682-83. Newspapers have no special immunity from the application of general laws, nor do they have a special privilege to invade the rights and liberties of others. *Id.*; *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937); *Galella v. Onassis*, 487 F.2d 986, 995 (2nd Cir. 1973). News organizations are not exempt from federal labor laws, *see Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192-93 (1946), or from nondiscriminatory forms of general taxation. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). State and federal governments can subject newspapers to generally applicable economic regulations without violating the first amendment. *Minneapolis Star & Tribune Co.*, 460 U.S. at 581.

The press also is not free to publish with impunity everything it desires to publish, nor does it have a constitutional guarantee of access to information not available to the public generally. *Branzburg*, 408 U.S. at 683-84. Consequently, the first amendment permits the media's access to grand jury proceedings, judicial conferences, meetings of other official bodies in executive sessions, disaster scenes, or criminal trials to be restricted in some circumstances. *Id.* at 684-85. *See also Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978) (first amendment generally grants press no greater right to information about trial than that of the general public).

It is apparent from these and other federal cases that news organizations cannot rely on the first amendment to shield themselves from criminal or civil liability simply because the acts giving rise to such liability were taken while

in pursuit of newsworthy information. It is even more apparent that news organizations are not exempt from liability when they breach contracts entered into for the very purpose of gathering the news.

The governmental interest in allowing the civil damage award in the instant case outweighs the intrusion on press freedom. The government has an interest in protecting the expectations of a person who freely enters into a contract in reliance on the court's power to remedy any damage he or she might suffer should the other party fail to perform.

The protection of contractual rights has been found to be a compelling state interest in another context. *See Duluth Lumber & Plywood Co. v. Delta Development, Inc.*, 281 N.W.2d 377, 381-83 (Minn. 1979) (holding state has compelling interest in applying its contract law to a civil dispute involving the Chippewa Tribe). The United States Supreme Court has implicitly found the protection of contractual rights to be a sufficient governmental interest to outweigh first amendment rights. *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam) (where both majority and dissenting opinions agreed contractual remedies were appropriate to enforce a contract to suppress speech).

We find no reason to provide less protection to the reasonable expectations of a newspaper informant than we would to any other party to whom the newspaper makes a promise. Surely, the newspapers would not suggest they are immune to ordinary commercial contracts for goods and services. Yet the newspapers maintain that an agreement with a news source is exempt from the law of contracts. We disagree. The agreement to provide information, like any other service, is an appropriate subject matter for the law of contracts.

Balanced against the clear interest of the state to impartially protect the sanctity of contracts is the alleged burden contract law places upon the press. The newspapers argue the newsworthiness of Cohen's name is enough to outweigh the state's interest in enforcing the contract. We disagree. The newspapers had an interest in providing information relating to the credibility and motivations of the source, but not necessarily in providing Cohen's name. Reporting that the source was aligned with the IR party in some manner would have satisfied the need to describe the source.

The newspapers argue that the government has no interest in allowing a civil damage award because the contract itself is invalid. The newspapers claim that only the journalist, and not the source, has a right to enforce a confidentiality agreement. The newspapers have failed to cite any case law which suggests that a source has no right to enforce a confidentiality agreement. In fact, leading authority implies that the source's wish to remain confidential is an important factor to consider in determining whether to compel release of information. Indeed, the only case we have found which discusses breach of contract suggests that a source may bring an action against a publisher for breaking a promise of confidentiality. *See Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282, 1292 n.15 (N.D. Ill. 1986).

The newspapers also argue that the governmental interest in allowing a civil damages suit is minimal because reporters' promises are ethical, not legal obligations, and court intervention in such cases is inappropriate. We disagree. The specter of a large damage award is a much more effective incentive for a publisher to honor a promise of confidentiality than the fear of criticism from other members

of the press. Indeed, any such fear of professional criticism in this case was apparently insufficient to convince appellants to abide by their promises.

We are not convinced that the public's access to information is restricted by our decision to allow a contract damage award in this case. Were we not to enforce the newspapers' promises of confidentiality, confidential sources would have no legal recourse against unscrupulous reporters or editors. Ultimately, news sources could dry up, resulting in less newsworthy information to publish. Our decision enhances the legislatively expressed interest in protecting confidential news sources in order to promote the free flow of information to the media and, ultimately, to the public. *See* Minn. Stat. § 595.022 (1988).

Our decision also does not intrude into the editorial process itself, and does not limit the right to publish information lawfully obtained without a promise of confidentiality. *Cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (suggesting government cannot regulate editorial processes). In this case, the newspapers, through their reporters, voluntarily agreed not to publish Cohen's name in return for other publishable information. Damages were awarded not merely because the newspapers published Cohen's name but because by doing so, they violated their contracts with him. We do not think it an undue burden to require the press to keep its promises.

C. *Waiver*

A constitutional right cannot be waived except in clear and compelling circumstances. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967). First amendment rights may be waived "where the facts and circumstances surround-

ing the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver." *Erie Telecommunications, Inc. v. City of Erie, Pennsylvania,* 853 F.2d 1084, 1096 (3rd Cir. 1988). Under the circumstances in this case, we conclude that the newspapers effectively waived any first amendment rights they may have had to publish Cohen's name as the source of the documents relating to Johnson. The two people pledging confidentiality in the instant case were both seasoned reporters who had given such pledges on a regular basis for many years prior to this incident. They also knew Cohen's status as an active and prominent Independent Republican, and thus knew that his name could be of public interest. Therefore, they understood that they were waiving the right to publish a potentially newsworthy item in return for obtaining another potentially newsworthy item from Cohen.

The newspapers also argue that the waivers were not knowing and voluntary because the reporters did not know the information they were about to receive would be such as to make Cohen seem petty and unscrupulous for having released it. Some form of this argument, however, could be used in every confidential source situation because the reporter never knows exactly what information he or she will get when the promise is made. Furthermore, in this case, the reporters must have anticipated Cohen was to give them damaging information about a DFL candidate because he said that the information might relate to a political candidate. The reporters' waivers are not any less knowing or voluntary merely because they did not know exactly what information they would receive.

It is significant that the waiver in this case was not ex-

tracted by the state. Rather, the waiver was part of a negotiated agreement between experienced reporters and an experienced political operative. Under these circumstances, the newspapers' waivers do not deserve as much protection as would a criminal defendant pleading guilty to a crime or waiving trial by jury. It also is significant that the alleged state action here was not intended to suppress a viewpoint. It was merely a content-neutral enforcement of an agreement between private parties of equal bargaining power.

II.

The Dispatch argues the trial court erred in failing to instruct the jury that there can be no contract where one party does not disclose all material facts which he knows the other party does not know and which the other party would need to know to make an informed decision under the circumstances. A party is entitled to a jury instruction only when the party presents evidence supporting its theory of recovery. *Lhotkan v. Larson,* 307 Minn. 121, 125 n.7, 238 N.W.2d 870, 874 n.7 (1976). Here, Salisbury stated that Cohen did not deceive or mislead him in any way. He also stated he was well aware that Cohen was active in the IR party and was a Whitney supporter. Finally, Salisbury did not even consider whether the information was to be exclusive, and he did not ask Cohen about it. Given the lack of evidence of any fraudulent inducement, the trial court properly refused to submit the proposed jury instructions.

The Tribune argues that the information provided by Cohen was so insignificant that it fails as consideration when compared with the much more valuable promise of confidentiality. As Cohen's expert journalist witness testified,

however, such deals are common in the industry and there is no way journalists can know exactly how valuable information will be before the return promise of confidentiality is given. Furthermore, both Salisbury and Sturdevant felt that the information about Johnson was in fact important, thus undercutting any failure of consideration argument. The documents Cohen supplied were sufficient consideration.

The Tribune also claims the contract is unenforceable because the subject matter of the contract is the deceptive manipulation of the electoral process. The newspapers rely on 17 C.J.S. *Contracts* § 218 (1963), which states: "Contracts which impair or tend to impair the integrity of public elections are against public policy." This provision, however, contemplates contracts such as those where payment is contingent upon the use of influence to secure another's election or where the candidate is a party to the contract. Because Cohen made no payment to the newspapers and exacted no promise that the newspapers would use their influence or otherwise attempt to secure Whitney's election, the contract did not involve wrongful manipulation of the electoral process.

Finally, the newspapers argue that a promise of confidentiality is not enforceable because it is part of an "agreement that by its terms is not to be performed within one year from the making thereof." *See* Minn. Stat. § 513.01(1) (1988). The statute of frauds does not apply, however, where one party can and does fully perform within the year. *Langan v. Iverson*, 78 Minn. 299, 302, 80 N.W. 1051, 1052 (1899). The statute is thus inapplicable because Cohen fully performed his obligations upon delivery of the documents.

III.

The newspapers argue that the trial court erred in failing to grant judgment notwithstanding the verdict on the misrepresentation claim. The standard to be applied in determining the propriety of granting a motion for a judgment notwithstanding the verdict is whether there is any competent evidence reasonably tending to support the verdict. *Bisher v. Homart Development Co.*, 328 N.W.2d 731, 733 (Minn. 1983) (quoting *Seidl v. Trollhaugen, Inc.*, 305 Minn. 506, 507, 232 N.W.2d 236, 239 (1975)). The trial court must accept the view of the evidence most favorable to the verdict and admit every inference reasonably to be drawn from that evidence. *Id.* When the facts are undisputed and reasonable minds can draw but one conclusion, the question becomes one of law for the court. *Kramer v. Kramer*, 282 Minn. 58, 65, 162 N.W.2d 708, 713 (1968). We find in the instant case that there was no misrepresentation as a matter of law, and the trial court erred in failing to grant the newspapers' motion for judgment notwithstanding the verdict on the misrepresentation claim.

To be actionable, a misrepresentation must misrepresent a present or past fact. *Dollar Travel Agency, Inc. v. Northwest Airlines, Inc.*, 354 N.W.2d 880, 883 (Minn. Ct. App. 1984). Simply because a party in the future fails to perform does not mean that there was any misrepresentation at the time the contract was made. *Id.* However, if the party, when entering into the contract, never had any intent to perform the contract, then the act of entering into a contract with no intent to perform constitutes a misrepresentation. *Wood v. Schlagel*, 375 N.W.2d 561, 564 (Minn. Ct. App. 1985).

Cohen concedes the reporters themselves intended to perform the contracts and that they did not commit misrepresentations. He claims, however, that the editors never intended to perform the contracts and that the intent not to perform should thus be deemed to have been present at the inception of the contracts, when the reporters made the promises. Cohen relies on *Guy T. Bisbee Co. v. Granite City Investing Corp.*, 159 Minn. 238, 244, 199 N.W. 14, 16 (1924), for the proposition that an intent not to perform at the inception of a contract can be inferred where the period of time between the making of the promise and its repudiation is short, and there is no change in circumstances. Cohen's reliance on *Bisbee* is misplaced.

In *Bisbee*, there was other circumstantial evidence to suggest that the tortfeasor did not intend to keep the promise at the time the promise was made. Thus, the court was faced with an evidentiary problem in that, although the party may have indeed intended not to perform, there was no direct evidence of this intent. Recognizing that direct evidence of intent is often unavailable, the court held that under the circumstances outlined in that case, an intent not to perform could be inferred from the fact that the breach took place soon after the contracts were formed. *Id.* at 243-44, 199 N.W. at 16. In this case, however, because there is direct evidence of both the reporters' and editors' intentions, resort to inferences is unnecessary and inappropriate.

Cohen alternatively relies on *Swanson v. Domning*, 251 Minn. 110, 117, 86 N.W.2d 716, 721 (1957), which held that where a principal becomes aware that an agent has made untrue representations of fact, regardless of whether the agent himself knew the representations were untrue, the principal may not retain the benefits of that transaction

and at the same time escape liability for the untrue representations by which the benefits were obtained. *Swanson* does not apply here, however, because the agents themselves made no misrepresentations, either innocently or knowingly.

Cohen also argues that his misrepresentation claim is based on the reporters' concealment of the fact that they had no authority to bind the newspapers. We find no evidence to support this theory. An omission of a material fact may give rise to a cause of action for misrepresentation if one party has special access to the facts and the other does not, or if omitting the fact is misleading. *Sit v. T & M Properties*, 408 N.W.2d 182, 186 (Minn. Ct. App. 1987). In this case, however, there was no evidence the reporters who promised confidentiality had special access to the newspapers' written policy regarding confidentiality. The evidence showed they were unaware of it. Further, there was no evidence that the omission of fact was misleading. The actual practice of the newspapers was to abide by their reporters' promises of confidentiality. In fact, no witness could recall a prior instance when the promise of a reporter was vetoed by an editor. Seasoned reporters believed they had authority to bind the newspapers. Based on past practice, we believe they did have such authority. Because it was the newspapers' practice to honor their reporters' promises of confidentiality, the reporters did not by omission misrepresent their authority.

Under these circumstances, the trial court erred in failing to grant the newspapers' motion for judgment notwithstanding the verdict on the misrepresentation claim. There was no evidence of material misrepresentations or omissions. Accordingly, we reverse on this issue. Because the newspapers engaged in no independent tort, punitive damages are unavailable, *see Haagenson v. National Farmers Union*

Property & Casualty Co., 277 N.W.2d 648, 652 (Minn. 1979), and the trial court's award of punitive damages must be set aside.

IV.

Because there were no misrepresentations, Cohen may recover only compensatory damages resulting from the breaches of contracts. The nonpunitive damages were awarded to compensate Cohen for loss of his job. The newspapers claim these are consequential or special damages, i.e., damages not contemplated by the parties when entering into the contracts, and therefore are not recoverable in a breach of contract action.

Minnesota follows the rule of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), which holds that damages recoverable in contract actions are those which arise naturally from the breach or those which can be supposed to have been contemplated by the parties when the contract was formed. *Lesmeister v. Dilly*, 330 N.W.2d 95, 103 (Minn. 1983). Whether damages naturally arose from the breach (reasonably foreseeable as a probable consequence) or were contemplated by the parties is a question of fact which depends upon the nature of the contract and the circumstances surrounding its execution. *Franklin Manufacturing Co. v. Union Pacific Railroad Co.*, 311 Minn. 296, 298-99, 248 N.W.2d 324, 326 (1976).

When asked why he wanted anonymity, Cohen testified:

> I feared retribution, I feared retaliation that could be damaging to me personally, that could damage my wife and daughters, that could damage the campaign, by a powerful media, by powerful politicians, for revealing the truth.

He also stated:

> I think that were my identity revealed because I was the messenger of ill tidings that the public, my employer, the press, the world at large, would heap opprobrium on my head.

Even if Cohen himself did not fear specifically for the loss of his job, a Dispatch editor and an expert journalist witness both testified that confidential sources often seek confidentiality exactly because they are afraid they might lose their jobs. The expert witness testified that editors are or should be well aware of the reasonable consequences, including loss of employment, which could occur if the confidences are revealed. The evidence was sufficient to support the finding that the loss of Cohen's employment was reasonably foreseeable. Cohen's job loss therefore is in the nature of general, as opposed to consequential, damages and is recoverable in contract.

V.

The Tribune argues that the trial court erred in admitting a number of Tribune newspaper articles. The trial court has discretion in its determinations as to the relevance and prejudicial effect of evidence. *State v. Lee*, 282 N.W.2d 896, 901 (Minn. 1979). The admission of inadmissible evidence requires a new trial only if the error is prejudicial *See Fewell v. Tappan*, 223 Minn. 483, 497, 27 N.W.2d 648, 656, (1947).

The challenged newspaper articles fall roughly into three categories. First, a number of the articles were written with the use of confidential sources, whose identities were newsworthy according to Tribune witnesses. Despite the

newsworthiness of these sources' identities, the Tribune never revealed their identities. Second, some articles used confidential sources despite the fact that the Tribune did not have an "exclusive" on the information from the sources. This evidence was offered to rebut the claim that Cohen's identity was revealed because he failed to give the Tribune an "exclusive." Finally, Cohen offered the garbage can editorial cartoon and two column articles to show that the Tribune was acting with willful indifference to his rights, and was continuing to disparage him while failing to disclose its own breach of promise. This evidence of the Tribune's failure to act evenhandedly was offered to rebut claims that the Tribune had to publish Cohen's identity to give its readers a fair picture.

We conclude that the trial court was well within its discretion in determining that the offered newspaper articles were relevant and more probative than prejudicial. *See* Minn. R. Evid. 403. The Tribune has failed to show that the trial court clearly abused its discretion in admitting the articles.

The Tribune also argues that the closing argument for Cohen was so inflammatory that a new trial is required. We disagree. A major focus of the newspapers' trial strategy was to portray Cohen as a scurrilous and dishonest politicker. In light of these attacks on Cohen's character, comments on the newspapers' ignoble motivations are not unduly prejudicial. The trial court gave a lengthy curative instruction designed to neutralize the strong arguments made by counsel on all sides. Further, the closing argument at issue was based on admissible evidence or reasonable inferences drawn from the evidence. Under these circumstances, the trial court's refusal to order a new trial based on inflammatory arguments was not an abuse of discretion. *See Connolly v. Nicollet Hotel*, 258 Minn. 405, 420, 104 N.W.2d 721, 732 (1960).

DECISION

The trial court's judgment determining that the newspapers are jointly and severally liable for $200,000 in compensatory damages as a result of their breaches of contract is affirmed. The trial court erred, however, in failing to set aside the misrepresentation claim because there was no evidence that the newspapers made material misrepresentations or omissions. Because the newspapers engaged in no independent tort, the trial court's judgment awarding punitive damages to Cohen is reversed.

Affirmed in part and reversed in part.

8-29-89 /s/ MARIANNE D. SHORT

CRIPPEN, Judge, concurring in part, dissenting in part

I agree appellants are entitled to relief from a judgment premised on a tort allegation. Because we are compelled to respect vital standards on freedom of the press, the judgment on respondent's contract claim is fundamentally flawed and also should be reversed. *See* U.S. Const. amend. I (enunciating the freedom of speech, and expressly prohibiting laws abridging the freedom of the press); Minn. Const. art. 1, § 3 (likewise adding to the guarantee for free speech a declaration that "the liberty of the press shall forever remain inviolate").

Support for the contract claim is premised on two categories of argument, and both misshape the law of the case.

First, it is said that conflict with the first amendment here is unsubstantial or even nonexistent. To the contrary, what has happened here involves the exercise of the coercive power of the state to punish the choice of the private press to publish. Making the problem still more critical, this sanction occurs for printing a true story on the purely political behavior of a public figure, and on the effort of respondent to cover the occurrence of that conduct.

Second, addressing the sacrifice of press freedom, it is asserted that this is justified by predominant considerations. This claim is premised on the notion that verbal assurances of a press reporter are uniquely important, either for the sake of respondent or as a measure of improvidence of the press justifying the loss of its freedoms. Here again, the arguments are untenable; they conflict with important decisions delimiting the state interest in common law claims, and stringent restrictions on the notion of any waiver of freedom of the press.

The consequence of these mistaken propositions of law is a decision for sanctions which is out of sync with settled first amendment principles. No authority, direct or by remote analogy, permits an award of damages for publishing political material, and justifies this as an application of state common law not even slightly limited in deference to the first amendment. Nor does any authority, direct or by analogy, permit sanctions for publishing political information and justify this on the premise that the press waived the right to publish, much less on the premise such a waiver occurs upon assurances not to publish solicited informally from media reporters.

More particularly, there are six fundamental misconceptions in the rationale for the contract claim. Four are in the effort to deny that this encroachment on the first amendment is significant. The fifth is the unwarranted enlargement of a state interest in the common law of contracts. The sixth is the wrongful disregard for limits on the notion of a press freedom waiver. In each instance, propositions favoring the damage award are made without precedential authority or by reference to cases that do not adequately support the contention.

1. *First amendment implicated.*

Initially, it is argued that there has been no restriction of press freedom in this case, nothing more than "neutral enforcement" of contract law. The trial court concluded that respondent's contract claim was one with "no constitutional dimension." This proposition depends on disregard for essential facts of the case, and it relies on authorities having no bearing on the kinds of restrictions occurring here.

We are not dealing with a regular contract claim. Rather, respondent asks the courts to enforce an agreement not to publish — a pledge not to exercise press freedom. In different words, respondent seeks a judicial decree that the choice to publish information is unlawful and subject to the sanction of a money judgment. Neither the promise nor the claim are neutral to the first amendment. Rather, both inescapably implicate freedom of the press.

Authorities are cited for the proposition that civil and criminal remedies may be applied by the courts even if they place "certain conditions" upon the publication of newsworthy information. This statement of law is premised on a concept having to do with remedies which only incidentally

affect press freedom, and no authorities on the subject stand for a proposition nearly so bold as to permit the direct imposition of penalties for publishing a political news story. *See Branzburg v. Hayes,* 408 U.S. 665, 682 (1972) (enforceability of civil and criminal statutes only "incidentally burdening" the press); *Price v. International Union,* 621 F.Supp. 1243, 1246-50 (D. C. Conn. 1985) (commercial labor-management contract; trial court dicta on enforceability of union dues provision, thus enabling union political activity; decision without judicial action on the content of employee speech).

In sum, the suggestion here that the damage award is neutral to press freedom is unsound.

2. *Intrusion upon editorial process.*

To otherwise distance this case from the first amendment, it is argued that the trial court's judgment does not intrude into the editorial process, but only upon the rights and privileges surrounding promises of anonymity. This observation is essentially inaccurate, and it is not supported by any authority.

The issue on the contract claim focused singularly on the exercise of editorial judgment. Moreover, as suggested by appellant Cowles, the grievance respondent developed before the trial court was not on the choice to disclose his name but on the other contents of the resports — the breach of contract claim was thin cover for a much more intrusive indictment on editorial choices.

When the state determines through civil lawsuits what constitutes a contract, when a breach occurs, and which special circumstances permit disregard of the promise, it usurps editorial decisionmaking and chills exercise of press

freedom. In addition, this regulation inevitably shapes the decision about when the promise is appropriately used. It is for editors, not for judges, to determine whether identificatent should be made and to decide when publication is important. So, for example, in the context of this case, it is for editors, not for judges, to determine whther identification of respondent was necessary for an accurate report on the political event.

3. *However pictured, intrusion is intrusion.*

Respondent argues that regulating press freedom in the circumstances of this case does not frustrate purposes of the first amendment but enhances them — that appellants really should accept the trial court judgment, because a litte correction is for their own good. Respondent portrays a public policy for anonymity of sources, so that the press has an enlarged capacity to get disclosures of information. Thus, as respondent observes, the press has historically defended its right against disclosure of sources. *See, e.g., Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978); *see also* Minn. Stat. § 595.021-.025 (1988) (statutory limits on compulsory disclosure). Respondent also produced expert opinions that the violated promise of anonymity constitutes a breach of journalistic ethics.

Undoubtedly, the good judgment of the press is a matter of serious public importance. Moreover, it is certainly plausible to believe that press agencies will generally deplore compulsory disclosure of sources. Nevertheless, it must be recognized that the honor and the effectiveness of press agencies is a matter of their own prerogative, subject to the public exchange of ideas. all protected by the first amendment. *Miami Herald Publishing Co. v. Tornillo,* 418 U.S.

241, 258 (1974) (not yet demonstrated how government can regulate the exercise of editorial control and judgment "consistent with First Amendment guarantees of a free press as they have evolved to this time."). The agencies of government, including the judiciary, have neither the right nor the duty to measure or establish the wisdom and honor of the press.

4. *Freedom from sanctions for publication.*

Finally, to further the attempt to imagine a gulf between this case and the Constitution, the plea is made that at least this case does not involve prior restraint. While this distinction may be made, there is no authority whatsoever suggesting cause to minimize, even by comparison with prior restraint law, the extraordinary first amendment danger in permitting damage awards as a sanction for publication on public issues.

To the contrary, according to authoritative declarations of law, it is important that the courts vigorously scrutinize money judgments and other sanctions against the choice to publish. *See Sullivan*, 376 U.S. at 277 (inhibiting effect of damage awards); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) ("chilling" effect of press burden to prove truth when sued for damages). In addition, as discussed below on the issue of waiver, a federal appellate court in a suit for damages has attested that it is "manifest," even where an individual has agreed not to publish, that the first amendment would not permit restrictions on publication of unclassified information on the political topic of government activity. *United States v. Snepp*, 595 F.2d 926, 930 n.2, 932 (4th Cir. 1979).

5. *Contract law versus the first amendment.*

Ultimately, the majority describes the manner in which the first amendment is implicated by the trial court judgment. The court concludes it has found an "effective incentive" for publishers. It is contended that the trail court's intrusion upon the first amendment is justified.

The argument here to justify limiting press freedom rests on the premise that Minnesota's contract law is a compelling interest such as to shape and restrict constitutional law. Thus, in harmony with the historic misapplication of various state law claims, the common law of contracts is given "talismanic immunity" from constitutional limitations. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). There is no authority for this position, either in terms of the first amendment or otherwise.

It is said, mistakenly, that the Minnesota Supreme Court has classified the state interest in contract law as compelling. *Duluth Lumber & Plywood v. Delta Development, Inc.*, 281 N.W.2d 377, 380-83 (Minn. 1979) is cited as support for such a proposition. The most that can be said of *Delta Development* is that there are some circumstances where the state's interest in commercial contracts may supersede some competing interests. *Id.* at 380-83 (state interest in an Indian agency's agreement to buy materials from off the reservation compels disregard for competing principles on Indian rights of self-government). *Delta Development* did not deal with a constitutional right, much less with freedom of the press or any other right under the first amendment. Moreover, the case requires an examination of the circumstances of each case, which must be done here.

How is the state's interest to be evaluated correctly? As already noted, governmental action in the form of an award

of damages stifles first amendment freedoms. It has a more "inhibiting" effect than regulation with criminal sanctions. *Sullivan,* 376 U.S. at 277. This public restriction of press freedom is unlawful absent demonstration of a state interest "of the highest order." *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 105 (1979).

Before examining the competing state interest, it is necessary to recognize the weight on the other side of the scale. Only an extraordinary state interest permits limitation of the first amendment, because the first amendment has such preeminence in our law. "The suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean v. American Press Co.,* 297 U.S. 233, 250 (1936). The freedom of the press is nothing less than "supremely precious" in our society. *NAACP v. Button,* 371 U.S. 415, 433 (1963). The Constitution highlights press freedom from among forms of free speech; singularly, our state constitution promises that press freedom will "forever remain inviolate," untouched. Minn. Const. art. I, § 3.

In addition, it is a settled matter of law that the situation here is at the very pinnacle of concern for press freedom. The topic of respondent's conduct is a public and political matter which the Supreme Court finds "at the heart of the first amendment's protection." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978) (citing *Thornhill v. Alabama,* 310 U.S. 88, 101 (1940)). Speech on public issues rests "on the highest rung of the hierarchy of first amendment values." *Carey v. Brown,* 447 U.S. 455, 467 (1980). To be even more particular, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of

campaigns for public office." *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971).

How significant is the competing state interest? There are some identifiable state concerns that supersede the freedom of the press. Thus, for example, in *Sullivan* and its progeny, the United States Supreme Court carefully enunciated the nature and extent of an overriding state interest to protect individuals from publication of false information. Only recently the Court issued another among several decisions on state interests in protecting privacy. *The Florida Star v. B.J.F.,* 57 U.S.L.W. 4816, U.S. June 21, 1989). In *Florida Star,* the court noted various other significant state interests, including its interest in fair criminal trials. *Id.,* 57 U.S.L.W. at 1417-18 n.5, 1418 n.6.

In this case, respondent did not act as a private figure but as a political operative in public places, dealing with a purely political topic. The disputed publications of appellants were certainly on "matters of public concern." *Thornhill,* 310 U.S. at 101. No privacy interest is involved; in contrast, the topic requires the most urgent respect for first amendment freedom that is appropriate for political campaign activity. *Monitor Patriot Co.,* 401 U.S. at 272.

Further, respondent's claim is not premised on the notion of a published falsehood. We are dealing with true information, and it is the truth that has hurt respondent. *See Garrison v. Louisiana,* 379 U.S. 64, 74 (1964) ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.").

What then is the state interest reflected in this trial court judgment? Respondent was given assurances of anonymity and he acted on them. He may have trusted that nothing more would be said about his conduct. The bargain was

broken and respondent suffered damages. Still, respondent identifies the interest as one to uphold an "ordinary commercial arrangement." The interest is reflected in the common law of contracts. Incidentally, a great portion of this common law is given over to the notion of equitable principles that preclude mechanical application of contract doctrine.

The state's interest to enforce performance of contracts, in the circumstances of this case, is mostly common. *Cf., e.g., Delta Development,* 281 N.W.2d at 380-83 (interest predominates over certain statutory or treaty interests, and then only in limited circumstances). Even if viewed expansively, it does not rise to the prescribed highest order which permits disregard of the first amendment.

The events here are colored singularly by a political scheme to broadcast a political attack but at the same time to evade responsibility for the act. Respondent was the chosen operative for that purpose. He went into the forums of public discussion to volunteer information, and to elicit promises that his unseemly activity would be covered up. He assembled the ingredients for an editorial predicament: to publish respondent's information as an anonymous report would be petty; to bury the information he delivered would be partial; and to imprecisely attribute disclosure of the information to a candidate's campaign would be illegitimate. To accomplish his ends respondent chose not to approach the editors who would be expected to make publication decisions. He chose not to make his proposal in a deliberative setting. Instead, he approached reporters on their beat, expecting he might readily arouse in them some desire for nuggets of political news.

Whether or not this course of conduct produced an agreement according to the niceties of contract and agency law, the enforcement of the purported agreement is not a matter of state interest of the highest order. Moreover, because respondent's concealment attempt did not regard false information or private conduct, his complaint involves a state interest in civil sanctions which is unadorned by any additional cause for coercive steps against the press. We need not decide whether some agreements on the content of publication might be enforceable. In the circumstances here, the Constitution should prevail.

Some might prefer wording this rationale on contract claims in terms of the law of contracts on agreements void as against public policy. The public policy in this instance is first amendment law, and this alternative approach to the issue requires the same comparison of competing interests. Whichever approach is taken, the result is the same. The contract claim should not have been tried and a judgment on the claim should not be affirmed.

6. *First amendment not waived.*

Respondent contends that the newspapers waived constitutional freedoms by agreeing not to expose his conduct. Here, respondent puts his argument in the form addressed in *Sullivan:* whether the press has done anything to forfeit its freedom under the Constitution. *Sullivan,* 376 U.S. at 271.

The waiver argument provides a new framework to examine this first amendment issue, but is twice mistaken. First, the waiver contention is premised on a contract claim already defective for want of an adequate state interest for its protection.

Second, respondent's waiver argument exposes further obstacles to his contract case. There are stringent conditions

for waiver of first amendment press freedoms. The broad view of waiver urged by respondent and adopted by this court requires disregard for the law of the case on these conditions.

Singularly, the waiver contention here rests on the proposition that the first amendment may be waived when it is clear one has done so knowingly and voluntarily, a matter of law attributed to *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1096 (3rd Cir. 1988). This description of the law is incomplete, even as to the language of *Erie*. *Id.* at 1094 (no such waiver absent "clear and compelling circumstances.").

The courts scrutinize the claim of waiver with vigor more clearly evident than already observed in assessment of state interests. "[C]ourts indulge every reasonable presumption against waiver" of any fundamental constitutional right. *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (citing *Hodges v. Easton*, 106 U.S. 408, 412 (1882)). If waiver of first amendment press rights can occur at all, it will arise only in "clear and compelling" circumstances. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967). If a waiver is identified, it "must be narrowly construed to effectuate the policies of the First Amendment." *National Polymer Products, Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 424 (6th Cir. 1981).

The circumstances here do not constitute, clearly and compellingly, a case where first amendment freedom has been renounced. Respondent solicited promises of reporters to serve his personal interests, to hide political conduct that others would believe to be shabby. He neither sought nor obtained a deliberative pledge of anonymity by media editors. Finally, what respondent wanted was not discussed,

viz., an editorial decision to repudiate the fundamental responsibility to fairly and truthfully inform the public on political campaign conduct. The issue is not whether a waiver occurred under these circumstances for civil law purposes. We are not at liberty to disregard the constitutional conditions on waiver.

Given publication of true facts on an important event of a political campaign, the clear and compelling case here is for upholding press freedom. On both a regular contract approach and a waiver analysis, respondent's breach of contract claim was constitutionally defective and should not have been tried.

Further analysis reveals the waiver concept is even more restricted, and respondent's contract claim more surely defeated. To explain this proposition, it must first be observed that there is no precedent for a finding of waiver by agreement on the part of the press, and no more than mixed indications regarding waiver by agreement for any political speech. Respondent cites as authority on the issue the *per curiam* decision of the United States Supreme Court in *Snepp v. United States*, 444 U.S. 507 (1980). In *Snepp*, the court found enforceable a former CIA agent's agreement to submit material for pre-publication review. However, the holding was not based on waiver of rights or the effects of a regular agreement, but on the intelligence agent's trust relationship in having access to classified information, such that his agreement for pre-publication clearance was a trust agreement.

More importantly, *Snepp*, which reviewed a trial court damage award, stands for a very different conclusion of law. In this and other decisions on the rights of former CIA agents, dealing both with prior restraint and damage claims,

it has been recognized that because of the first amendment the agreements of agents against disclosures are "manifestly" unenforceable to the extent those agreements address nonclassified information. *See United States v. Snepp*, 595 F.2d at 930 n.2, 932 (notwithstanding Snepp's agreement to never divulge "any information concerning intelligence or CIA that has not been made public by CIA," "manifestly the first amendment would not permit the CIA to withhold consent to publication except with respect to classified information not in the public domain"); *Snepp*, 444 U.S. at 510, 511 (twice noting without correction the Fourth Circuit opinion that Snepp had a first amendment right to publish unclassified information). *United States v. Marchetti*, 466 F.2d 1309, 1313, 1317 (4th Cir. 1972) (as to unclassified information, the first amendment precludes disclosure restrictions established "contractually or otherwise;" by signing a secrecy agreement, Marchetti "did not surrender his First Amendment right of free speech.").

Why might waiver be so inapplicable in the context of the first amendment, at least as to true information on political affairs? I suggest that disfavor for such a waiver harmonizes with the interest of the people generally, discussed in the conclusion of this opinion, for the unfettered flow of public information. As observed there, freedom of the press is everyone's right, not belonging alone to the editor and publisher. How can the law attribute to the press the capacity to waive a right which is not its own?

Clearly, there is a general interest of a unique kind regarding press freedom on political facts. We need not decide whether this policy precludes waiver of the freedom in all such cases. At least in the circumstances here it should be held that there was no waiver and that there was no enforceable contract.

7. *Acquisition of information.*

Finally, respondent states an additional argument needing only brief attention. Addressing both his tort and his contract claims, respondent suggests that appellants' conduct constitutes wrongful acquisition of information. Although this argument may have bearing on a claim of tortious misconduct, I do not perceive its relevance to the contract issue. There was no wrongful act of appellants in connection with the conduct of their reporters or in the acquisition of information peddled by respondent. Respondent's grievance is with the editorial choice to publish, which invites attention to the earlier acquisition events only insofar as they bear on the flawed claims of a contract or a waiver of first amendment rights.

8. *Conclusion.*

The award of damages here directly and substantially implicates the first amendment, and the vitality of the freedom of the press predominates in the face of competing considerations on contract law and waiver of rights. A judgment for damages in this case erroneously restricts a fundamental freedom we are to hold inviolate.

Each misconception discussed here poses the same danger, a construction of constitutional law which licenses judicial action, employing the common law, to decide whether press reports are just and to exact a penalty for a publication found to be objectionable. This is fundamentally offensive to the first amendment. "Truth and understanding," said Milton to Parliament in 1644, "are not such wares as to be monopolized and traded in by tickets and statutes and standards." J. Milton, *Areopagitia*, The Portable Milton 181 (1977).

Correctly applied, the first amendment guarantees that the press has special immunity from officials willing to restrict its freedom. Neither the courts nor other agencies of government can deal with the conduct of publishing in the same way they handle other conduct with similar characteristics. Why must this be so? First, although the press often cannot claim protection afforded to the weak, it is as likely target of regulation as the weakest citizen because it is the critic of the regulator, the adversary for many designs of public figures. Properly upheld, the first amendment defeats this risk. In addition, the first amendment is not singularly for protecting press agencies, but generally "to prohibit government from limiting the stock of information from which members of the public may draw." *Bellotti*, 435 U.S. at 783. It is the high interest of the people against government regulation, not alone the interest of the speaker or publisher that is threatened by judicial proceedings on common law claims. Speech on public affairs is "more than self-expression, it is the essence of self-government." *Garrison*, 379 U.S. at 75. Even more to the point, demonstrating an interest everyone shares with the private press:

> A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

Grosjean, 297 U.S. at 250. In sum, the publication conduct of the press cannot be governed by the courts in the same manner as other conduct is judged. The award of damages here defies these principles and conflicts with the very essence of a special freedom of the press under the Constitution.

I join the majority on respondent's tort claim, but I respectfully dissent on the choice to affirm the portion of the judgment premised on a contract claim.

/s/ GARY L. CRIPPEN
August 29, 1989

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

Dan Cohen,

Plaintiff,

vs.

Cowles Media Company, a corporation d/b/a Minneapolis Star and Tribune Company and Northwest Publications, Inc., a corporation.

Defendants.

ORDER AND MEMORANDUM
File No. 798806

The above-entitled matter came on for hearing on the 22nd day of August, 1988, before the undersigned Judge of the District Court on motion by Defendants for judgment notwithstanding the verdict, or in the alternative, a new trial.

Elliot Rothenberg, Esq., appeared for and on behalf of the Plaintiff; James Fitzmaurice, esq., appeared for and on behalf of the Defendant Cowles Media Company; Paul Hannah, Esq., appeared for and on behalf of Defendant Northwest Publications, Inc.

Upon all the files records, proceedings and arguments of counsel herein,

IT IS HEREBY ORDERED, THAT:

1. Defendant's motion for judgment notwithstanding the verdict be and hereby is denied.

2. Defendants' motion for a new trial be and hereby is denied.

3. The attached memorandum is incorporated herein by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY
Dated: 18 Nov 88

/s/ FRANKLIN J. KNOLL
BY THE COURT:

MEMORANDUM

This matter came on for jury trial before this Court commencing July 5, 1988. The jury returned its verdict in favor of the Plaintiff on July 20, 1988. The Court adopted the jury's findings and filed its Findings of Fact, Conclusions of Law and Order for Judgment on August 12, 1988. Subsequently, Defendants brought this motion seeking judgment notwithstanding the verdict or, in the alternative, a new trial.

Defendants' move for judgment notwithstanding the verdict on the following grounds:

1. That the evidence, as a matter of law, failed to show the existence of a validly enforceable contract;

2. That the evidence, as a matter of law, failed to show that Defendants or either of them were guilty of fraud or misrepresentation; and

3. That the evidence, as a matter of law, does not support the Plantiff's claim for punitive damages upon the grounds urged by Defendants at the close of the Plaintiff's case in chief and again at the close of all of the evidence.

It is well-settled in Minnesota that judgment notwithstanding the verdict (judgment n. o. v.) is appropriate only where the jury's verdict is manifestly contrary to the evidence. Stated another way, a verdict should stand unless reasonable people can come to only one conclusion and that conclusion contradicts the jury's decision. *Sabasko v. Fletcher*, 359 N.W.2d 339 (Minn. App. 1984). Additionally, a motion for judgment n. o. v. admits every inference reasonably to be drawn from the evidence as well as the credibility of the testimony of the adverse party. Only where the facts are undisputed and reasonable minds can draw but one conclusion does the question become one of law for the Court. See, *Lamb v. Jordan*, 333 N.W.2d 852 (Minn. 1983); *Imdieke v. Blenda-Life, Inc.*, 363 N.W.2d 121, 123-24 (Minn. App. 1985). The Court has reviewed the parties' arguments as well as the record in this case and it is clear that the standard set by our Supreme Court has not been met. Accordingly, Defendants' motion judgment n. o. v. has been denied.

Alternatively, the Defendants seek a new trial, pursuant to Rule 59 of the Minnesota Rules of Civil Procedure, asserting three grounds in support of their motion:

1. Irregularities in the proceedings of the Court, and the orders of the Court and abuses of discretion by the Court which individually and collectively deprived Defendants of a fair trial:

2. Misconduct of Plaintiff's counsel: and

3. Errors of law.

It is well-settled in Minnesota that the primary consideration for the Court in determining whether to grant a new trial is prejudice. *Wild v. Rarig,* 302 Minn. 419, 234 N.W.2d 775 (1975). New trials should be granted only where the substantial rights of a party have been so violated that it is clear that a fair trial was not had. *See generally* 2 Herr and Haydock, *Minnesota Rules Annotated,* Section 59 (1985).

The Defendants have argued that the Court abused its discretion in receiving at trial certain evidence in the form of news articles, editorials and columns which they assert was irrelevant. In receiving this evidence, the Court found it to be indeed relevant and specifically determined that its probative value significantly outweighed any potential prejudicial impact. It is well-settled that evidentiary rulings are within the sound discretion of the trial Court. *Lines v. Ryan,* 272 N.W.2d 896 (Minn. 1978). Defendants' arguments in this regard are unpersuasive. The gratuitous conclusion accompanying Defendants' motion that this evidence "led the jury to speculate . . . and is the probable basis for the jury's award of punitive damages" demeans the intelligence of the jury. Accordingly, Defendants' motion for a new trial on this ground has been denied.

Defendants' second argument alleges that Plaintiff's counsel engaged in flagrant misconduct during the course of his final argument to the jury. Comments on admissible evidence, reasonable inferences drawn from such information, factors that affect the credibility of witnesses, and other references are appropriate in closing argument. *Connolly*

v. Nicollet Hotel, 258 Minn. 405, 104 N.W.2d 721 (1960); *Fieve v. Emmeck,* 248 Minn. 122, 78 N.W.2d 343 (1956); *Burns v. Kvernstoen,* 246 Minn. 75, 74 N.W.2d 398 (1955). The Court has reviewed the record and has concluded that prejudice of the kind contemplated by the rules is absent from this case. If anything, closing arguments by all counsel were emotionally charged, but certainly not to a level beyond the assessability of a competent jury. In addition, the Court's curative instruction at the close of the arguments clearly reemphasized the preeminence of the jury's fact-finding function as compared to the non-evidentiary nature of counsel's arguments. The Court instructed the jury as follows:

> . . . I would like to point out, Members of the Jury, and remind you, in view of the strong arguments made to you by counsel yesterday, obviously all of the parties feel very strongly about the case and that there were strong arguments presented to you yesterday. I would like you to bear in mind, however, that what is important in the case is not what counsel urges you to believe or what weight counsel urges you to give to the testimony or other evidence in this case. What matters is the amount of weight that you believe should be given to the evidence. What matters is what you believe to be true and the amount of weight which you believe should be given to the evidence. In that regard, you may, if you choose, disregard any of the comments made by counsel in their closing arguments with regard to weight to be given to evidence or what they urge on you as to what the facts are, because the facts are to be determined exclusively by you as the jury and

the weight to be given to those facts and the other evidence in the case is wholly within your domain.

A new trial is not warranted on the ground of attorney misconduct.

The Defendants have assigned error to the Court's ruling that the First Amendment of the United States Constitution is not available in this case to shield them from the consequences of breach of contract or violation of the general tort laws. Defendants' argument in this regard places far in the background the jury's findings of willful misrepresentation and the breach of a valid contract. Here, the newspapers have set up the First Amendment as a wall of immunity protecting them from any liability for their conduct while gathering news. In this regard, the United States Court of Appeals for the Second Circuit in *Gallella v. Onassis,* 487 F.2d 986 (1973) stated, "there is no such scope to the First Amendment right. Crimes and torts committed in news gathering are not protected."

The Defendants have further described the relationship between reporter and source as "sensitive" and "interpersonal", one approaching a sacred trust. Other strained metaphors invoking comparisons to family and romantic relationships are employed by the Defendants in their argument that their otherwise valid contracts should not be subject to laws governing commercial relationships. This Court is not persuaded that the relationship between reporter and source is anything other than commercial. The advertising war currently being waged by one Defendant in this case against the other is ample evidence of the profit motive underlying their operations.

Defendants next argue that by failing to immunize the reporter-source relationship from the enforcement of our

civil laws the Court subjects it to distortion and exploitation. Several hypothetical situations have been posed by the Defendants supposedly demonstrating the potential for creative Plaintiffs' attorneys to play havoc with the news gathering process. The analysis fails to recognize the voluntary nature of contractual relationships generally. More specifically, it ignores the plain fact that any restrictions reporters may place upon themselves with regard to source anonymity are undertaken voluntarily and in exchange for the valuable consideration of "getting the scoop".

Similarly, the argument that unscrupulous persons will make unfounded accusations if news organizations are held subject to the law is without merit. This Court will not accept the premise that the appropriate solution to unfounded accusations is to bar the availability of redress to citizens who have been damaged by unlawful news gathering. The newspapers' assertion that "severe criticism from fellow professionals and skepticism, loss of credibility and trust from potential or existing sources" provides sufficient deterrent against journalistic excesses rings not only unrealistic but disingenuous.

In a more substantive argument Defendants have urged that since the particular manner in which they breached their contract with the Plaintiff involved the act of publication, the First Amendment must immunize them from liability. In this regard, the Defendants rely heavily on *Cantrell v. Forest City Publishing Company,* 484 F.2d 150 (6th Cir. 1973), *reversed* 419 U.S. 245 (1974), wherein reporters visited with children at the home of the victim of a bridge collapse, taking photographs without their objections. The subsequent news story contained numerous inaccuracies and the mother of the children sued the news-

paper for invasion of privacy. The Sixth Circuit in discussing the Plaintiff's invasion of privacy claim stated:

> [T]he gravamen of this action lies in the claim that the publication of the article, not the physical intrusion, damaged the plaintiff. . . . In her testimony Mrs. Cantrell claimed no injury from the entry of the two defendants on her premises, but testified that the article made her mad and upset her because of all the untruths it contained.

484 F.2d at 154-44.

The facts in the case at bar are clearly distinguishable from those in *Cantrell,* where the Defendant reporters did nothing illegal during their news gathering and made no promises to the plaintiff in exchange for the receipt of valuable information. Rather, in *Cantrell,* the plaintiff's complaint was directed at the inaccuracies and untruths in the published news story. Here, the Defendants entered into a contract with the Plaintiff where the hornbook elements of offer, acceptance and consideration were unmistakably present. The Defendants then breached that contract after thoroughly considering what they were about to do. The complained-of acts in *Cantrell,* i.e., inaccuracies and untruths, are very clearly analogous to a defamation claim, wherein the United States Supreme Court has properly clothed the press with a quasi-privileged status and has required plaintiffs to meet a more strenuous burden of proof.

However, where there is no claim of libel or slander, or facts analogous thereto (as is the case here) courts have made it clear that no First Amendment interest exists in protecting news media from "calculated misdeeds". See, e.g., *Time, Inc. v. Hill,* 385 U.S. 374, 389-390 and 384n.9.

Certainly, the knowing and willful breach of a legally sufficient contract after hours of thought and discussion by corporate officers can fairly be characterized as a "calculated misdeed." Just as "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of news gathering", *Dietemann v. Time, Inc.,* 449 F.2d 245, 249 (9th Cir. 1971), it similarly should not be construed to immunize news organizations from the application of other aspects of the civil law. To do so would be to trivialize the First Amendment and weaken its capacity to protect true freedom of expression.

The newspapers finally have argued that holding them responsible to the law of contracts will somehow chill freedom of expression guaranteed by the First Amendment. In that regard, it is the Court's view that to deny an injured Plaintiff recovery for demonstrated harm done to him by the breach of an otherwise valid contract would be to deprive that citizen of the protection of the law without any countervailing benefit to the legitimate interest of the public in being informed. Rather than chill freedom of expression, such a result would "encourage conduct by news media that grossly offends ordinary men." *Dietemann* at 250.

FJK

STATE OF MINNESOTA DISTRICT COURT
County of Hennepin Fourth Judicial District

Court File No. 798806

Dan Cohen,

Plaintiff,

vs.

Cowles Media Company, a corporation, d/b/a Minneapolis Star and Tribune Company and Northwest Publications, Inc., a corporation,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT

The above-entitled matter came duly before the Court for trial by jury of six persons commencing on July 5, 1988. James Fitzmaurice, Esq., appeared on behalf of Defendant Cowles Media; Paul Hannah, Esq., appeared on behalf of Defendant Northwest Publications; Elliot Rothenberg, Esq., appeared on behalf of Plaintiff. The trial concluded on July 20, 1988 with submission of the case to the jury on a special verdict. On July 22, 1988, the jury returned its special verdict which is accepted and adopted by the Court and attached hereto as the Findings of Fact.

The Court hereby makes its:

CONCLUSIONS OF LAW

1. Judgment is entered against Defendants jointly and severally in favor of Plaintiff in the amount of $200,000.00.

2. Judgment is entered against Defendant Cowles Media in favor of Plaintiff in the amount of $250,000.00.

3. Judgment is entered against Defendant Northwest Publications, Inc. in favor of Plaintiff in the amount of $250,000.00.

4. Plaintiff is entitled to judgment for his costs and disbursements herein.

5. Entry of judgment is stayed for 30 days.

ORDER FOR JUDGMENT

LET JUDGMENT BE ENTERED ACCORDINGLY.
Dated: 9 Aug 88

BY THE COURT:
/s/ FRANKLIN J. KNOLL

STATE OF MINNESOTA DISTRICT COURT
County of Hennepin Fourth Judicial District

Court File No. 798806

Dan Cohen,

Plaintiff,

vs.

Cowles Media Company, a corporation, d/b/a Minneapolis Star and Tribune Company and Northwest Publications, Inc., a corporation,

Defendants.

SPECIAL VERDICT

We, the jury, for our verdict in this matter, find as follows:

BREACH OF CONTRACT CLAIMS

1. Was there a valid oral contract between plaintiff Dan Cohen and defendant Minneapolis Star and Tribune?

   Yes ☒ No ___

2. If your answer to Question No. 1 was "Yes", then answer this question:

   Did defendant Minneapolis Star and Tribune breach that contract?

   Yes ☒ No ___

3. If your answer to Question No. 2 was "Yes", then answer this question:

   Was the breach of contract a direct cause of damage to plaintiff?

   Yes ☒ No ___

4. Regardless of your answers to Questions 1-3, answer this question:

   Was there a valid oral contract between plaintiff Dan Cohen and defendant St. Paul Pioneer Press Dispatch?

   Yes ☒ No ___

5. If your answer to Question No. 4 was "Yes", then answer this question:

   Did defendant St. Paul Pioneer Press Dispatch breach that contract?

   Yes ☒ No ___

6. If your answer to Question No. 5 was "Yes", then answer this question:

   Was the breach of contract a direct cause of damage to plaintiff?

   Yes ☒ No ___

MISREPRESENTATION CLAIM

7. Did defendant Minneapolis Star and Tribune make any false representations of fact to plaintiff Dan Cohen?

   Yes ☒ No ___

8. If your answer to Question No. 7 was "Yes", then answer this question:

   Were the false representations of fact made by defendant Minneapolis Star and Tribune misrepresentations of a material fact?

   Yes ☒ No ___

9. If your answer to Question No. 8 was "Yes", then answer this question:

   Did defendant Minneapolis Star and Tribune make a false respresentation of fact with knowledge that the representation was false when they made it?

   Yes ☒ No ___

10. If your answer to Question No. 9 was "Yes", then answer this question:

    Did defendant Minneapolis Star and Tribune make a false representation of fact to plaintiff with the intention of inducing plaintiff to rely upon that representation?

    Yes ☒ No ___

11. If your answer to Question No. 10 was "Yes", then answer this question:

    Did plaintiff Dan Cohen reasonably rely upon the misrepresentation of fact made by defendant Minneapolis Star and Tribune?

    Yes ☒ No ___

12. If your answer to Question No. 11 was "Yes", then answer this question:

    Were the misrepresentations of fact made by defendant Minneapolis Star and Tribune a direct cause of damage to plaintiff Dan Cohen?

    Yes ☒ No ___

13. Regardless of your answers to Questions 7-12, answer this question:

    Did defendant St. Paul Pioneer Press Dispatch make any false representations of fact to plaintiff Dan Cohen?

    Yes ☒ No ___

14. If your answer to Question No. 13 was "Yes", then answer this question:

    Were the false representations of fact made by defendant St. Paul Pioneer Press Dispatch misrepresentations of a material fact?

    Yes ☒ No ___

15. If your answer to Question No. 14 was "Yes", then answer this question:

    Did defendant St. Paul Pioneer Press Dispatch make false representation of fact with knowledge that the representation was false when they made it?

    Yes ☒ No ___

16. If your answer to Question No. 15 was "Yes", then answer this question:

    Did defendant St. Paul Pioneer Press Dispatch make a false representation of fact to plaintiff with the intention of inducing plaintiff to rely upon that representation?

    Yes ☒ No ___

17. If your answer to Question No. 16 was "Yes", then answer this question:

    Did plaintiff Dan Cohen reasonably rely upon the misrepresentation of fact made by defendant St. Paul Pioneer Press Dispatch?

    Yes ☒ No ___

18. If your answer to Question No. 17 was "Yes", then answer this question:

    Were the misrepresentations of fact made by defendant St. Paul Pioneer Press Dispatch a direct cause of damage to plaintiff Dan Cohen?

    Yes ☒ No ___

DAMAGES

19. Regardless of how you answered any of the above questions, you must answer the following question:

    What sum of money, if any, will fairly and adequately compensate the plaintiff Dan Cohen for his loss?

    $200,000.00

PUNITIVE DAMAGES

20. If your answer to Question No. 12 was "Yes", then answer this question:

    Do you find by clear and convincing evidence that the conduct of defendant Minneapolis Star and Tribune showed a willful indifference to the rights of plaintiff Dan Cohen?

    Yes ☒ No ___

21. If your answer to Question No. 20 was "Yes", then answer this question:

    What sum of money should be awarded to the plaintiff Dan Cohen as punitive damages against the defendant Minneapolis Star and Tribune?

    $250,000.00

22. If your answer to Question No. 18 was "Yes", then answer this question:

    Do you find by clear and convincing evidence that the conduct of defendant St. Paul Pioneer Press and Dispatch showed a willful indifference to the rights of plaintiff Dan Cohen?

    Yes ☒ No ___

23. If your answer to Question No. 22 was "Yes", then answer this question:

    What sum of money should be awarded to plaintiff Dan Cohen as punitive damages against defendant St. Paul Pioneer Press and Dispatch?

    $250,000.00

The undersigned have agreed with this verdict.
Dated: 7/22/88

FOREPERSON
Lydia Brichta
Mary C. Fuller
John Tapsak
Lisa I. Lang
Connie Marsh

STATE OF MINNESOTA
County of Hennepin

DISTRICT COURT
Fourth Judicial District

Dan Cohen,

Plaintiff,

vs.

Cowles Media Company, a corporation, d/b/a Minneapolis Star and Tribune Company and Northwest Publications, Inc., a corporation,

Defendants.

ORDER AND MEMORANDUM
File No. 798806

The above-entitled matter came on for hearing on the 6th day of February, 1987, before the undersigned Judge of the District Court on motion by Defendants for summary judgment or, in the alternative, to dismiss Plaintiff's action.

Elliot Rothenberg, Esq., appeared for and on behalf of the Plaintiff; Patricia Hirl, Esq., appeared for and on behalf of Defendant Cowles Media Company; Paul Hannah, Esq.,

appeared for and on behalf of Defendant Northwest Publications, Inc.

Upon all the files, records, proceedings and arguments of counsel herein,

IT IS HEREBY ORDERED, That:

1. Defendants' motion for summary judgment be and hereby is denied in its entirety.

2. Defendants' motion to strike Plaintiff's claim for punitive damages is granted as to the breach of contracts claim (*Barr/Nelson Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 52-53).

3. Defendants' motion to strike Plaintiff's claim for punitive damages be and hereby is denied as to the misrepresentation claim.

4. Defendants' motion for dismissal of Plaintiff's claim be and hereby is denied.

5. The attached Memorandum be and hereby is incorporated herein by reference.

Dated: 19 June 87.

BY THE COURT:
/s/ FRANKLIN J. KNOLL

MEMORANDUM

The Court, in this case, is faced with an intriguing argument advanced by the State's two largest newspaper organizations. The newspapers seek, not vindication of the often-invoked right to shield the identity of their sources from

public disclosure, but rather the summary determination of this Court that they may not be held to contractual commitments to refrain from disclosing the identity of their sources. The newspapers seek the right, not to shield, but to disclose, in the face of their prior agreement not to disclose. Indeed, Defendants' counsel have advanced the argument that the First Amendment of the United States Constitution immunizes them from liability for breach of an otherwise valid contractual commitment to provide anonymity to its sources in return for the provision of information.

Defendants Cowles Media Company and Northwest Publications, Inc., publishers of the Minneapolis Star and Tribune and the St. Paul Pioneer Press, respectively, seek summary judgment or, in the alternative, dismissal of the Plaintiff's claims. Defendants have also moved the Court to strike the Plaintiff's claim for punitive damages.

The case arises on the following facts. On Wednesday, October 27, 1982, the Plaintiff Dan Cohen, contacted reporters of four local news organizations. At separate meetings with each reporter, Cohen offered to provide information concerning a prior misdemeanor conviction of a candidate for state-wide office, information not then publicly known. Cohen offered to provide this information on the explicit condition that his identity not be disclosed by the news organizations. The reporters, including those employed by the Minneapolis Star and Tribune and the St. Paul Pioneer Press, accepted the information and in return gave their commitment not to disclose the identity of its source.

Editors of the St. Paul Pioneer Press and the Minneapolis Star and Tribune determined later to override the reporters' promise not to identify Cohen and published the story, naming Cohen as its source. Cohen then brought this suit

in December of 1982, its amended complaint alleging breach of contract and fraudulent misrepresentation. The complaint also seeks punitive damages.

SUMMARY JUDGMENT ON PLAINTIFF'S BREACH OF CONTRACT CLAIMS IS NOT APPROPRIATE

The Defendants argue that Cohen's breach of contract claim should be summarily dismissed, arguing that the agreement with Cohen violates the statute of frauds and is therefore unenforceable as a matter of law. Minnesota Statutes, Section 513.01, Minnesota's statute of frauds, provides in relevant part as follows:

> No action shall be maintained, in either of the following cases, upon any agreement, unless such agreement or note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party therewith:
>
> (1) Every agreement that by its terms is not to be performed within one year from the making thereof; . . . .

Rule 56.03 of the Minnesota Rules of Civil Procedure provides that summary judgment is appropriate only where there are no material facts in dispute and one party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment it is not the Court's function to resolve issues of fact; rather, the Court's function is limited to determining whether there exists an issue of fact to be tried. *Anderson v. Twin City Rapid Transit Co.*, 250 Minn. 167, 84 N.W.2d 593 (1957). All doubt and factual inferences must be resolved against the moving party and in favor of the non-moving party. *Nord v. Herreid*, 305

N.W.2d 337 (Minn. 1981). The Court's opinion as to the likelihood of a particular party prevailing at trial is not a criterion as to whether summary judgment should be granted. See, *Dempsy v. Jarosack*, 290 Minn. 405, 188 N.W.2d 286 (Minn. 1983). Summary judgment may only be granted where it is "perfectly clear that there exist no fact issues material to a resolution of the issues involved in the cause of action." *Donnay v. Boulware*, 275 Minn. 37, 144 N.W.2d 711, 716 (1966). However, where the facts material to the resolution of the litigation are not in dispute and as a matter of law compel only one conclusion, summary judgment is appropriate. *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630 (Minn. 1978).

While it is true, as Defendants assert, that an agreement which by its terms cannot be performed within one year must be in writing to meet the statute of frauds, the provision of the statute pertains only to those contracts whose performances *cannot possibly* be completed within a year. *Braaten v. Midwest Farm Shows*, 360 N.W.2d 455 (Minn. App. 1985); Restatement (Second) of Contracts, Section 130, comment a (1981) (hereinafter "Restatement"). Thus, contracts of uncertain duration are simply excluded from the statute. The Restatement provides the following illustrative example:

> A orally promises to work for B, and B promises to employ A during A's life at a stated salary. The promises are not within the one-year provision of the statute, since A's life may terminate within a year.

Because a strict construction of the statute of frauds would be likely to lead to hardship and injustice, the result has

been a tendency by Courts toward a narrow construction of the statute. Accordingly, the Plaintiff should be given the opportunity to demonstrate to the trier of fact *the possibility* that his agreement with the Defendants was capable of completion within one year.

Additionally, a well recognized interpretation of the one-year provision of the statute provides that the statute does not apply to a contract which is performed by one party at the time it is made, or to one which may be performed by one of the parties within a year. *Landan v. Iverson,* 78 Minn. 299, 80 N.W. 1051 (1899); Restatement, Section 130 comment d. In *Landan,* which has not been overruled, the Minnesota Supreme Court pronounced: "The statute applies only to contracts which are not to be performed upon either side within a year. If all that is to be performed on one side is to be performed within a year the contract is not within the statute. *Id.* at 1052. Here, facts established in Plaintiff's affidavits demonstrate that he delivered the information to the reporters. No additional performance was required of him pursuant to the agreement. In accordance, then, with the rule in *Landan,* and the comment of the Restatement, the agreement at bar appears to fall outside of the purview of the statute of frauds.

Finally, the statute of frauds provides that if the agreement "or some note or memorandum thereof" is in writing, the agreement is outside the purview of the statute. In this regard, the Restatment teaches as follows:

> "Writing" for this purpose includes any intentional reduction to tangible form. Commend d to Section 131. There is no requirement that the memorandum be communicated or delivered to any other party to the

> contract, or even that it be known to him or anyone but the signer. Comment b to Section 133.
>
> The signature to a memorandum may be any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer. Section 134.
>
> The signature need not appear on any particular part of the writing. . . . A printed letterhead or billhead may be adopted as a signature. Comment b to Section 134.
>
> The memorandum sufficient to satisfy the statute may be made or signed at any time before or after the formation of the contract. Section 136.
>
> There is no requirement that the memorandum be made contemporaneously with the contract. It may be made even after breach of repudiation. Comment b to Section 136.

The Court concludes that authoritative construction of the statute of frauds is broad enough to support a finding that the publication by both the Minneapolis Star and Tribune and the St. Paul Pioneer Press of the essential elements of Cohen's agreement with those newspapers constitutes a memorandum in writing sufficient to excise the agreement from the requirements of the statute.

In accordance with the above discussion, the Defendants' motion for summary judgment has been denied. This conclusion clearly flows from the Court's considering the facts, as it must, in a light most favorable to the non-moving party.

SUMMARY JUDGMENT ON PLAINTIFF'S MISREPRESENTATION CLAIM IS NOT APPROPRIATE

The Plaintiff claims that the "revocation" by the editors of the reporters' commitment not to disclose Cohen's identity constituted actionable misrepresentation. The Defendants seek summary judgment, arguing that the reporters' promises of anonymity are unactionable as a matter of law under two theories: first, that the promises constituted nothing more than good faith promises of performance in the future; second, that no evidence exists to suggest that the reporters did not intend to perform at the time the promises were made. In response, the Plaintiff argues that the Defendants, through their reporters, falsely represented that the reporters possessed the authority to bind their employers and that the Defendant newspapers (in contrast to the reporters) at no time had any intention of performing the agreement made on their behalf. (The Court notes that the reporters are not parties defendant to this action.) Defendants' memorandum is devoid of any discussion of the agency relationship between the reporters and their newspapers, and fails to point out that the reporters are not defendants to the action.

It is well settled that an act of an agent authorized by the principal constitutes the act of the principal. *Mackenzie v. Ryan*, 41 N.W.2d 878, 230 Minn. 378 (1950). It is also well settled that if an agent with a principal's knowledge and acquiescense makes false representations, and the principal remains silent, then the principal is responsible for the misrepresentation. *Perkins v. Orfield*, 145 Minn. 68, 176 N.W.2d 157 (1920). In the case at bar, it appears that the reporters were acting as the newspapers' agents, and the

Court must assume so for purposes of this motion. What is less clear is the scope of the reporters' authority with regard to making agreements to shield their sources. The determination of the authority as an agent is ordinarily in question of fact for the jury. *Gulbrandson v. Empire Mutual Ins. Co.*, 251 Minn. 387, 87 N.W.2d 850 (1958).

The first issue raised by Plaintiff's misrepresentation claim is whether the reporters misrepresented the scope of their authority by leading Cohen to believe that his identity would be shielded. As the Court has observed, questions as to the scope of an agent's authority are properly resolved by the trier of fact. *Gulbrandson, supra.*

A second issue inherent in the Plaintiff's misrepresentation claim is whether the newspapers are liable because *they* (rather than the reporters) at no time intended to perform the commitment made on their behalf by their agents. In Minnesota, the general rule is that to be actionable, a misrepresentation must relate to a past or existing fact and cannot ordinarily be predicated on representations which are mere promises or statements of an intention unperformed. *Dollar Travel Agency, Inc. v. Northwestern Airlines, Inc.*, 354 N.W.2d 880 (Minn. App. 1984). However, promises of intention to perform in the future may be actionable under Minnesota law if it can be demonstrated that the representors "from the start, never intended to fulfill their assurances." *Wood v. Schlagel*, 375 N.W.2d 531 (Minn. App. 1985). Stated another way, the statement of a representor's intention to do something, or of his or her expectation as to a matter *in futuro*, is a representation of the then existence of such intention, and is thus a statement of fact and not merely a promise. *Guy T. Bisbee Company v. Granite City Investment Company*, 159 Minn. 238, 199 N.W. 14 (1944).

The question of whether the representor here intended to stand by the commitment made to Cohen is one which must be determined from the circumstances surrounding the commitment, and as such is properly reserved for the finder of fact. In this regard, authorities have observed that repudiation of a promise soon after it is made with no intervening change in the circumstances constitutes evidence of an intention not to perform. Prosser and Keaton, *The Law of Torts*, Section 109 at 764 (95th Ed. 1984).

THE FIRST AMENDMENT DOES NOT IMMUNIZE THE DEFENDANTS FROM THE CONSEQUENCES OF BREACHING AN OTHERWISE VALID CONTRACT

In considering the Defendants' First Amendment argument for summary judgment, the Court must assume that the agreement between Cohen and the reporters constituted a legally binding contract. As was made clear in the oral argument on this motion. the Defendants are arguing that parties who enter into otherwise valid contractual relationships with newspaper organizations, such as an agreement to maintain the confidentiality of a news source in exchange for the news story, may not rely on the newspaper's promise to perform, even though that party may have performed fully his or her part of the bargain. This is so, Defendants argue, because to require the newspaper to perform its agreement would somehow operate to censor the news in violation of the First Amendment's guarantees of a free press. Defense counsel vehemently argued that even if the newspapers' breach could be shown to be the proximate cause of demonstrable damages to a plaintiff, that plaintiff should have no recourse because the First Amendment

will not permit it. In fact, in response to a question by the Court, counsel for the Minneapolis Star and Tribune replied that such a plaintiff should take his or her complaint with its attendant damages to the Minnesota Press Council.

While this Court has long been committed to the proposition that newspapers should not be inhibited or impeded from printing the truth, this Court will not adopt the premise that the First Amendment should operate to excuse news organizations from the consequences of a decision to publish when that decision involves the breach of a valid contract or of the general tort laws.

The Defendants cite several well-known decisions of the United States Supreme Court in their position. These include: *New York Times Company v. Sullivan*, 376 U.S. 254 (1964); *Smith v. Daily Mail Publishing Company*, 443 U.S. 97 (1979); *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829 (1978); *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975). Most, if not all of the authorities cited by the Defendants involve instances where information was obtained by lawful means. To this Court's knowledge, the United States Supreme Court has never interpreted the First Amendment so as to protect news organizations from the results of unlawful conduct. In that regard, in *Bransburg v. Hayes*, 408 U.S. 665 (1972), the United States Supreme Court observed:

> The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.

Id. at 683. Similarly, the Ninth Circuit, interpreting the Supreme Court's landmark ruling in *New York Times Company v. Sullivan, supra,* a case heavily relied on by the Defendants, observed:

> Indeed, the [Supreme] Court strongly indicates that there is no First Amendment interest in protecting news media from calculated misdeeds. No interest protected by the First Amendment is adversely affected by permitting damages or intrusion to be enhanced by the fact of later publication of the information that the publisher improperly acquired.

Dietemann v. Time, Inc., 449 Fed.2d 245, 250 (9th Cir. 1971).

This Court can perceive no constitutional dimension in the case at bar. This is not a case about free speech, rather it is one about contracts and misrepresentation. The views of the Second Circuit in *Galella v. Onassis,* 487 Fed.2d 486, 995-96 (2d Cir. 1973) are appropos: ". . . There is no threat to a free press in requiring its agents to act within the law."

/s/ FK
6/19/87

(3)

No. 90-634

IN THE

Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENT COWLES MEDIA COMPANY IN OPPOSITION TO PETITION

JAMES FITZMAURICE
JOHN BORGER*
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 336-3000
Attorneys for Respondent Cowles Media Company
*Counsel of Record

Of Counsel:
RANDY M. LEBEDOFF
425 Portland Avenue South
Minneapolis, MN 55488
(612) 673-4600

1990 — Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411 — 588-7506

Questions Presented

Should this Court grant review of decisions of the Minnesota Supreme Court based upon state law of contract and promissory estoppel, in order to consider petitioner's expansive and novel theories of the interests of confidential news sources?

Should this Court overrule a century and a half of precedent and hold that the Contract Clause of the United States Constitution applies to state judicial decisions?

Respondent Cowles Media Company respectfully submits that this Court should not grant certiorari to review the two questions presented in Cohen's Petition, as rephrased above. In the event that this Court does grant certiorari, respondent submits that the following question is also presented for review:

Does the First Amendment permit a public figure plaintiff to recover reputation-related damages arising from the publication of information about matters of public significance without proving that the publication contains a false statement of fact which was made with knowledge of its falsity or with reckless disregard for its truth or falsity?

LIST OF PARTIES

The parties to the proceeding below were the petitioner Dan Cohen, respondent Cowles Media Company d/b/a Minneapolis Star and Tribune Company, and respondent Northwest Publications, Inc. In addition, the Associated Press appeared as *amicus curiae* in support of Cowles Media Company and Northwest Publications, Inc. before the Minnesota Supreme Court.

Cowles Media Company has no parent company and has no subsidiaries other than wholly owned subsidiaries.

Respondent Cowles Media Company respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion in this case by the Supreme Court of the State of Minnesota, which is reported at 457 N.W.2d 199 (Minn. 1990).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court: **Page**

Other Courts:

Secondary Authorities:

IN THE

Supreme Court of the United States

No. 90-634
October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENT COWLES MEDIA COMPANY IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

Petitioner Dan Cohen obtained a jury verdict on two theories: misrepresentation and breach of contract. The appellate courts overturned the misrepresentation verdict because the facts of the case simply did not support a fraud claim. Although his petition is somewhat unclear on this point, Cohen does not appear to be seeking further review on the misrepresentation issue. The disposition of the misrepresentation issue eliminates his recovery of $500,000 in punitive damages.

The Minnesota Supreme Court disposed of the contract

claim on the sensible state law policy grounds that the law "does not create a contract where the parties intended none." (A-9.) "In other words, contract law seems here an ill fit for a promise of news source confidentiality. To impose a contract theory on this arrangement [between a reporter and a source] puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship." (A-10.) The Minnesota Supreme Court thus, as a matter of state law, held that no contract had been created in the present circumstances. Neither ruling presents a federal question for this Court.

The only context in which the Minnesota Supreme Court mentioned a federal constitutional issue (specifically, the First Amendment) was in its discussion of a possible theory of promissory estoppel — a theory which was not presented at trial, which was not briefed, and which "surfaced" (A-11) only obliquely at the end of oral argument at the Minnesota Supreme Court. Petitioner frames the question for review in sweeping terms: "Does the First Amendment of the U.S. Constitution grant newspapers immunity from liability for damages caused by dishonoring promises of confidentiality given in exchange for information on a political candidate?" The actual decision of the Minnesota Supreme Court is more narrow:

> We . . . are not inclined to decide more than we have to decide. There may be instances where a confidential source would be entitled to a remedy such as promissory estoppel, when the state's interest in enforcing the promise to the source outweighs First Amendment considerations, but this is not such a case. (A-14.)

Cohen's Petition does more than overstate the holdings of the Minnesota Supreme Court. It also leaves unclear exactly which of those holdings he is asking this Court to review. His second Question Presented for Review (concerning the Contract Claim) obviously applies only to the Minnesota Supreme Court's ruling on the contract claim. However, his first Question Presented for Review (concerning the First Amendment) and his entire discussion of the First Amendment and confidential sources are an exercise in obfuscation. He blurs any distinction between the Minnesota Supreme Court's discussions of contract and promissory estoppel and implies that both involved the First Amendment, despite the clear statement by that court that "First Amendment implications" played no role in its resolution of the contract claim (A-12-13).

REASONS WHY THE PETITION SHOULD BE DENIED

IN ITS CURRENT POSTURE, THIS CASE PRESENTS NO IMPORTANT QUESTIONS OF FEDERAL LAW TO BE SETTLED BY THIS COURT.

The Minnesota Supreme Court reversed each of Cohen's jury awards on issues of state law. Accordingly, this Court has no reason to grant certiorari merely to grapple with the unusual factual circumstances of this case.

I.

The Minnesota Supreme Court's Ruling on the Promissory Estoppel Issue is a Proper Balancing of Interests under State Law.

The Minnesota Supreme Court's discussion of a possible promissory estoppel theory does include consideration of First Amendment issues. (A-10-14.) That discussion, how-

ever, does not necessarily present First Amendment questions in a manner requiring further consideration by this Court. Petitioner at no time pursued recovery under a theory of promissory estoppel. "Estoppel" arose at oral argument before the Minnesota Supreme Court only in the context of questions from dissenting Justice Yetka, during the rebuttal presentations of counsel for the newspapers; that estoppel discussion took a substantially different form than that discussion in the majority opinion.[1] The court's references to "First Amendment considerations" (A-14) are broad enough implicitly to include state as well as federal constitutional guarantees, together with state common law interests in protecting public debate on political campaigns.

The Minnesota Supreme Court noted that in deciding whether to enforce a promise under a promissory estoppel analysis, it "must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity." (A-13.) The court concluded that free press rights were particularly important in the present circumstances:

> Of critical significance in this case, we think, is the fact that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign. The potentiality for civil damages for promises made in this context chills public debate, a debate which Cohen willingly entered albeit hoping to do so on his own terms. (A-13.)

[1]Upon request by the Court, counsel will provide a tape recording of the oral argument and an unofficial transcript of the argument.

Cohen mischaracterizes the Minnesota Supreme Court's carefully limited decision as "empower[ing] newspapers to inflict injuries with impunity by deliberately breaking promises of confidentiality given for the purpose of obtaining desired information." Cohen Petition at 6.

In seeking a federal question to present to this Court, Cohen understandably focuses upon the free press rights involved in the promissory estoppel "balance." Cohen's focus ignores the other half of that balance, namely, "the common law interest in protecting a promise of anonymity." (A-13.) Just how strong is that interest? If it is relatively weak under state law, then there is no reason for this Court to decide whether the Minnesota Supreme Court accorded too much weight to the First Amendment interests here.[2] Cohen's interests here in fact are substantially less significant than the national security interests in protecting classified information which were the subject of the written employment agreement in *Snepp v. United States*, 444 U.S. 507 (1980), or the privacy interests of the prison inmate who protested being filmed in an "exercise cage" in *Huskey v. National Broadcasting Co., Inc.*, 632 F. Supp. 1282 (N.D.

[2]The Minnesota Supreme Court did not expressly address either how much weight would be necessary to outweigh First Amendment interests or how much weight should be given to Cohen's interests in these particular circumstances. The publications at issue here involved truthful information about a matter of public significance. "If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *The Florida Star v. B.J.F.*, 491 U.S. ___, ___, 105 L.Ed. 2d 443, 455 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979). Cohen's desire to engage in negative campaigning under a cloak of anonymity is not a "highest order" interest. Indeed, Cohen's interest is sufficiently weak in the present circumstances so that any free press interest at all should be sufficient to overcome it. Cohen wants a rule that would prevent courts and juries from any consideration whatsoever of the interests of the press and the public in communicating truthful information about matters of public significance. This Court should reject such a rule now, as it consistently has done in the past.

Ill. 1986). Nor does this case involve the government's interest in setting conditions on the use of information which the government itself has extracted from an unwilling source, as in *Seattle Times Company v. Rhinehart,* 467 U.S. 20 (1984).

Cohen stresses the general importance of confidential sources in the newsgathering process, Cohen Petition at 6-10, but totally ignores the fact that confidential sources enjoy common law or statutory protection only in the context of privileges protecting *reporters* from compulsory testimony in some circumstances:

> However the [journalist's] privilege is applied, it appears to protect the communicator, not the source. Only the reporter may waive the privilege. Minnesota's *Cohen* case [prior to the decision of the Minnesota Supreme Court] alone suggests otherwise. Generally, a broken promise by a reporter raises an ethical question but provides no legal cause of action.

D. Gillmor & J. Barron, Mass Communication Law: Cases and Comment 394 (5th Ed. 1990).

Sources cannot "waive" the privilege and compel reporters to testify. *United States v. Cuthbertson,* 630 F.2d 139, 147 (3rd Cir. 1980) ("The privilege belongs to CBS, not the potential witnesses, and it may be waived only by its holder."), *cert. denied,* 449 U.S. 1126 (1981); *Palandjian v. Pahlavi,* 103 F.R.D. 410, 413 (D.D.C. 1984) ("Initially, and this Court believes dispositively, the privilege belongs to the movant journalist and not to the defendant. . . . Therefore, even if the notes and tapes in question are of defendant's own words, she is not entitled to 'waive' the privilege for the movant."); *Los Angeles Memorial Coliseum Commission v. National Football League,* 89 F.R.D. 489, 494 (C.D. Cal. 1981) ("The journalist's privilege belongs to the journalist alone and cannot be waived by persons other than the journalist."); *State v. Boiardo,* 416 A.2d 793, 798 (N.J. 1980) ("the privilege is that of the newsperson and not the source").

Courts have refused to allow a source to invoke the privilege to shield information that a newsperson may wish to disclose, *Small v. UPI,* 1989 U.S. Dist. Lexis 12459 at *3 (S.D.N.Y. 1989) (Roberts, Mag.) ("Plaintiff correctly argues that under both the New York Shield Law and the First Amendment, the privilege attaches to the journalist, not to the source of his information. . . . Thus [the sources and their employer] are not entitled to assert the privilege."), or to protect themselves (as possible sources) from depositions noticed by a third-party seeking to determine the identities of confidential sources, *Stuart W. Jamieson v. John Doe and Mary Roe,* Nos. CX-89-406 and CI-89-407 (Minn. Ct. App. March 21, 1989).[3]

The Minnesota Supreme Court itself observed:

> Here Cohen lost his job; but whether this is an injustice which should be remedied requires the court to examine a transaction fraught with moral ambiguity. Both sides proclaim their own purity of intentions while condemning the other side for "dirty tricks." Anonymity gives the source deniability, but deniability, depend-

[3]The decisions in *Stuart W. Jamieson v. John Doe and Mary Roe,* Hennepin County District Court File No. MC 88-18860, *on petition for writs of prohibition and discretionary review,* Minnesota Court of Appeals Nos. CX-89-406 and CI-89-407 are unpublished, but were called to the attention of the Minnesota Supreme Court in Cowles Media Company's Brief below at 40 n.11 and were reproduced in the Appendix to the Minnesota Supreme Court. The plaintiff in that case allegedly had been defamed by an anonymous source in a newspaper article and sought "to depose likely perpetrators of the falsehood," Hennepin County Dis-

> ing on the circumstances, may or may not deserve legal protection. If the court applies promissory estoppel, its inquiry is not limited to whether a promise was given and broken, but rather the inquiry is into all the reasons why it was broken. (A-11.)

The promissory estoppel ruling below therefore can be seen as resting upon the adequate and independent state law ground that, in the circumstances of the present case, Cohen willingly entered into the public debate and has no legally protectable interest in anonymity.

II.

The Minnesota Supreme Court's Ruling on the Breach of Contract Claim Presents No Federal Question.

A. *State Law Alone Determines When an Agreement Becomes a Binding Contract.*

The Minnesota Supreme Court, held as a matter of valid and sufficient state law, that the circumstances of agreements between reporters and sources do not create recognizable

---

trict Court Order and Memorandum dated February 1, 1989, at 7 (MN-APP 568). The protected deponents "could themselves be, or could know who are, the 'sources' in the erroneous newspaper article" (MN-APP 569). The District Court rejected the deponents' efforts to assert the shield law privileges on their own behalf:

> The statutory privilege is that of the media, not of the sources. To permit sources to hide behind the media's statutory privilege would encourage defaming and slandering informants to gain sanctuary for their misdeeds by the device of broadcasting falsehoods to the media. The issue of media statutory privilege is not before the Court, since Deponents are not protected by the statute and have no standing to assert the media's privilege. (Id. at 9; MN-APP 570).

The Minnesota Court of Appeals denied the potential deponents' petitions for writs of mandamus and for discretionary review, noting that "Petitioners failed to establish they are likely to suffer significant injury as a result of the trial court's order, or to establish a compelling reason for this court to extend discretionary review to a discovery determination." Minnesota Court of Appeals Order dated March 21, 1989, ¶10 (MN-APP 573).

contracts. Indeed, it is widely accepted that not every agreement, not every conversation, not every exchange of promises between two persons becomes a legally binding contract. "[I]f, from the statements or conduct of the parties or the surrounding circumstances, it appears that the parties do not intend to be bound or do not intend legal consequences, then under the great majority of the cases there will be no contract." J. Calamari & J. Perillo, *Contracts* § 2-4 at 28, 30 (3d ed. 1987). As the Minnesota Supreme Court held below, the law does not create a contract where the parties intended none, nor does the law consider binding every exchange of promises. (A-9.) Neither Cohen nor the reporters anticipated resorting to the courts to enforce their arrangement. It is purely a matter of state law where to place any particular agreement on the continuum between non-binding social promises and legally binding formal contracts. The Minnesota Supreme Court concluded that agreements between reporters and sources in the special milieu of media newsgathering do not form legal contracts. "What we have here, it seems to us, is an 'I'll scratch-your-back-if-you'll-scratch-mine' accommodation. . . . We conclude that a contract cause of action is inappropriate for these particular circumstances." (A-9, 10.) That conclusion rests directly and obviously upon a construction of state contract law.

B. *The Contract Clause Does not Apply to Judicial Decisions.*

Cohen disingenuously suggests that the holding below presents a federal question because the court's decision not to enforce his agreement with the newspapers allegedly violates the Contract Clause of the United States Consti-

tution. Cohen Petition at 16-18. "The short answer to this contention is that this provision [the Contract Clause], as its terms indicate, is directed against legislative acton only." *Barrows v. Jackson*, 346 U.S. 249, 260 (1953). A "long line of decisions" establishes that the Contract Clause does not apply to judgments of courts. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 & n.1 (1924) (footnote lists decisions back to 1847 on same point); L. Tribe, American Constitutional Law 613 n.1 (2d ed. 1988). Cohen brushes aside these cases by characterizing them as "[s]ome decisions antedating *Allied Structural Steel*." Petition at 18. While it is true that *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), is a later case, nothing in *Allied Structural Steel* suggests a contrary result; that case itself involved *legislation* which allegedly violated the Contract Clause. Cohen presents no compelling circumstances here to overrule nearly a century and a half of this Court's decisions.

III.

This Court Should Reject Petitioner's Attempt to Evade the Constitutional and Common Law Protections for Truthful Newspaper Reports of Matters of Public Interest in Political Campaigns.

Cohen's claims present, at base, yet another attempt to evade the protections of common law and of state and federal constitutions for truthful newspaper reports of matters of public interest. Cohen complains that he was damaged by publication of accurate accounts of his role in publicizing disparaging information about a candidate for statewide public office. From opening statement to closing argument, Cohen's trial tactics underscored that the gravamen of this case was the publication of information. Cohen's injuries

were characterized repeatedly in terms associated with reputational injury: "ridicule," "grief and embarrassment," "humiliation" and efforts "to assassinate the character." His counsel asked the jury to "restore . . . [Cohen's] good name." As Judge Crippen observed in his dissent in the Minnesota Court of Appeals, "the breach of contract claim was thin cover for a much more intrusive indictment on editorial choices." (A-48). Cohen had to try to disguise his claim under theories of fraud and breach of contract, because he had no defamation claim: The objectionable information was not published with actual malice in the constitutional sense, and it was indisputably true.

Such attempts to evade the strictures of defamation law usually have been recognized and rebuffed before they reach this Court. On occasion, however, this Court has had to reverse an award of damages based upon such end-runs around defamation law which somehow had survived their passage through the lower courts. *E.g., Hustler Magazine, Inc. v Falwell*, 485 U.S. 46 (1988) (tort of intentional infliction of emotional distress). The present claim for breach of contract represents nothing more nor less than another effort to recover defamation-type damages while avoiding defamation defenses.

This is the first case in which a breach of contract claim arising from media newsgathering activities resulted in a jury verdict for a plaintiff and even partially survived initial

appellate review.[4] Cohen's legal theory has an audacious scope. As presented by Cohen in the trial court and on appeal, the breach of contract claim left no room for consideration of free press interests or of the public's interest in obtaining full and accurate information about an upcoming election; once an agreement (however flimsy) was made and broken, the only question under Cohen's theory would be the extent of recoverable damages. Cohen's argument, that any information provided by a news source was sufficient to make a legally binding contract out of any promise made by a reporter, could produce enormous court intrusion into newsgathering activities. *See, e.g., Strick v. Supreme Court*, 143 Cal. App. 3d 916, 925 n.5, 192 Cal. Rptr. 314, 320 n.5 (Cal. Ct. App. 1983) (noting but not addressing plaintiffs' claim of breach of oral contract to "portray [plaintiffs] in a favorable light to the readers" if

[4]Courts before and after the first *Cohen* decision gave short shrift to contract claims arising from publication of allegedly confidential information. *See, e.g., Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 81, 155 Cal. Rptr. 29, 41 (Cal. Ct. App.), *Cert. denied*, 444 U.S. 984 (1979); *Stevenson v. Nottingham*, 4 Med. L. Rptr. 1585 (Fla. Cir. Ct. 1978); *Virelli v. Goodson-Todman Enterprises, Ltd.*, 142 A.D. 2d 479, 536 N.Y.S. 2d 571, 576, 15 Med. L. Rptr. 2447, 2450 (N.Y. App. Div. 1989), *appeal after remand*, 558 N.Y.S. 2d 314, 315, 18 Med. L. Rep. 1111, 1112 (N.Y. App. Div. 1990). Two courts in California allowed breach-of-contract claims against the media to proceed to trial, but the juries could not agree on a verdict. Borger, Publication Torts as Contracts and Misrepresentation: Redirecting Judicial Focus, *Libel Litigation 1990* at 35, 78 (Case 9) and 88 (Case 18) (PLI 1990. Cohen cites this article, by Cowles Media's counsel of record, as "list[ing] thirty cases around the country raising issues of violations of contracts or promises by media organizations." Cohen Petition at 10. The article in fact notes that "[f]ew reported decisions have discussed contract or fraud issues at length in connection with newsgathering or First Amendment defenses." Borger at 69; the cases collected cover a 23-year period and often touched upon contract and fraud issues briefly, tangentially and in dicta. The only newsgathering breach-of-contract case mentioned in that survey which is still active is *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289 (D. Minn. 1990) (summary judgment granted in favor of defendant), *appeal pending*, in which the plaintiff is represented by Elliot Rothenberg, Cohen's counsel of record here.

plaintiffs would talk to magazine reporters). Cohen's Petition makes much of the present factual setting of a confidential source, but his counsel has acknowledged elsewhere that "[p]otential claims for breach of contract, or fraud, [are] not limited to violations of promises of confidentiality." Rothenberg, Contract Law and the Media, *Libel Litigation 1990* at 23, 26 (PLI 1990). When state law permits claims against news organizations to proceed in the guise of fraud or breach of contract, courts may have to place first Amendment limitations on such claims. *See Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289 (D. Minn. 1990), *appeal pending*.[5] Here, however, the Minnesota Supreme Court dismissed Cohen's claims because they did not meet the requirements of state law. Accordingly, this Court does not need to consider the constitutional issues which may arise in other cases.

[5]In its briefs below, Cowles Media advocated a rule, along the lines of *Hustler Magazine v. Falwell*, that plaintiffs like Cohen who suffer reputational damages due to the publication of information about matters of public significance may not recover without showing that the publication contains a false statement of fact which was made with the level of fault required for the particular class of plaintiff involved. The Minnesota Supreme Court did not have to reach this issue, although it did hold that "Cohen would qualify as a public figure." (A-5 n.3.)

CONCLUSION

In its present procedural posture, this case does not present federal questions of sufficient importance to require this Court's review. Petitioner Cohen initially was able to avoid the requirements of an action for defamation by convincing a jury to award damages, based upon the publication of truthful information about campaign tactics, on the two legal theories of fraud and breach of contract. The appellate courts below reversed each jury award for reasons of state law. No reason remains for this Court to grant certiorari. Therefore, this Court should deny Cohen's petition.

Respectfully submitted,

JAMES FITZMAURICE
JOHN BORGER*
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 336-3000
Attorneys for Respondent
Cowles Media Company
*Counsel of Record

Of Counsel:
RANDY M. LEBEDOFF
425 Portland Avenue South
Minneapolis, MN 55488
(612) 673-4600

0307D/3318D

(4)

No. 90-634

IN THE
Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY,
d/b/a Minneapolis Star and Tribune Company, and
NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENT NORTHWEST PUBLICATIONS, INC. IN OPPOSITION TO PETITION

PAUL R. HANNAH
(Counsel of Record)
LAURIE A. ZENNER
HANNAH & ZENNER
1122 Pioneer Building
336 Robert Street
Saint Paul, MN 55101
(612) 223-5525

November 15, 1990

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

22

QUESTIONS PRESENTED

1. Whether the decision of the Minnesota Supreme Court that state contract law does not apply to promises of confidentiality extending from reporters to their sources raises any special and important issues of federal law that this Court should review.

2. Whether the Minnesota Supreme Court's opinion, as *dicta*, stating that First Amendment concerns would have defeated a claim for promissory estoppel under these facts raises any special and important issues of constitutional law that this Court should review, where the state court denied recovery on the claim as a matter of state law.

RULE 28.1 STATEMENT

Knight-Ridder, Inc. is the parent corporation of Respondent Northwest Publications, Inc. Respondent Northwest Publications, Inc. has no subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1990

No. 90-634

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY,
d/b/a Minneapolis Star and Tribune Company, and
NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENT NORTHWEST PUBLICATIONS, INC. IN OPPOSITION TO PETITION

The respondent, Northwest Publications, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Minnesota Supreme Court's decision in this case.

REFERENCE TO OPINIONS

The June 19, 1987 Order and Memorandum of the Minnesota District Court dening respondents' Motion for Summary Judgment are not reported but are reproduced at Pages A-78 to A-88 of the Appendix to the petition.

The November 18, 1988 Order and Memorandum of the Minnesota District Court denying respondents' Motion for Judgment Notwithstanding the Verdict, or, in the alternative, for a New trial are not reported but are reproduced at pages A-61 to A-69 of the Appendix to the petition.

The opinion of the Minnesota Court of Appeals dated August 29, 1989 is reported at 445 N.W.2d 248 and is reproduced at pages A-19 to A-61 of the Appendix to the petition.

The opinion of the Minnesota Supreme Court dated July 20, 1990 is reported at 457 N.W.2d 199 and is reproduced at pages A-1 to A-18 of the Appendix to the petition.

STATEMENT OF THE CASE

Respondent does not contest the fact that on October 27, 1982, petitioner Dan Cohen (Cohen) elicited a promise from Bill Salisbury (Salisbury), a reporter for the St. Paul Pioneer Press Dispatch, a daily newspaper published by respondent Northwest Publications, Inc., (Pioneer Press Dispatch). Salisbury promised that Cohen's name would not be used in connection with any article describing unspecified information provided by Cohen concerning an unspecified candidate. Respondent does, however, wish to supplement petitioner's factual recitation.

Dan Cohen is a sophisticated political figure and operative. He has long been active in Minnesota Independent-Republican (I-R) politics. In 1960 he worked for Richard Nixon's presidential campaign and in 1964 was a paid campaign worker on the staff of the I-R candidate for the U.S. Senate, Wheelock Whitney (Tr. 275). Whitney was also the Republican gubernatorial candidate in 1982.

Cohen made his own bid for political office in 1965. He was elected to the Minneapolis City Council, a post he held until 1969. In 1967, Cohen was elected President of the Council. Cohen then ran for Mayor of Minneapolis in 1969, and was defeated in a close race. After holding several jobs, Cohen was defeated in his bid for a seat on the Minneapolis City Council in 1973. In 1982, only a few months before the pivotal events in this case, Cohen lost a primary bid for the I-R nomination for Hennepin County Commissioner (Tr. 276-80).

Throughout his political and business career Cohen dealt with the press on a regular basis, becoming very familiar with its workings (Tr. 277-78, 372-73). As an elected public official he offered information to reporters on a confidential basis, and he testified that he had offered information on that basis

even after he left the City Council (Tr. 372). Cohen was no stranger to the tactic of offering information concerning another candidate to a reporter on the condition that his name not be published (Tr. 372-73). As a public relations professional, Cohen interacted with members of the press on a regular basis (Tr. 281, 297-300).

Cohen also worked in the newspaper business, first as a freelance newspaper columnist, and later as a contributor of editorial articles in the Minneapolis Star. He became familiar with the workings of newspapers, and with the authority exercised by editors (Tr. 289-92).

Early in the morning of October 27, 1982, Cohen participated in a meeting held at the campaign headquarters of Wheelock Whitney, then the I-R candidate for governor. A participant testified that Cohen favored leaking to the press certain court records concerning Ms. Marlene Johnson, the Democratic-Farmer-Labor (DFL) candidate for Lieutenant Governor (Tr. 721). Cohen disclosed none of these facts to Salisbury.

The court records which Cohen supplied to Salisbury, and the extenuating circumstances of the arrests of Ms. Johnson, are set forth in the Supreme Court opinion. (A-4). During the course of that day, the newspapers continued to learn facts which had not been disclosed to the reporters by Cohen. The fact that Cohen was the source of the information regarding Ms. Johnson was common knowledge in the news media, and was available through other sources. (A-5). In fact, Cohen seemed proud of his efforts when he personally informed his employer of his actions (Tr. 1499). The Whitney campaign acknowledged that Cohen was the source of the documents, but insisted that the campaign had no involvement in publicizing the information (Tr. 1436-38).

Editors of the two newspapers faced several alternatives described in the Supreme Court opinion. (A-4-5). After carefully considering those alternatives, each newspaper independently decided to inform its readers that Cohen was the source of the potentially damaging information.

David Hall, then the executive editor of the Pioneer Press Dispatch, decided to move any reference to Cohen to the bottom third of the story. As Hall testified:

> I did feel like that even though I was insisting that the circumstances of the information be in the story, that I still believed that the—the primary newsworthiness was this case that had been disclosed, what the candidate and her running mate, now Governor Perpich, had to say about it, and later, toward the end of the story, putting the story in the context of how we received [the information from Cohen], laid this out in a straightforward and nonjudgmental manner. I think it lets voters decide for themselves about how to treat this.

(Tr. 1434-35). The article appeared in the October 28, 1982 edition of the Pioneer Press Dispatch. This lawsuit was filed later that year.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has not presented a certworthy question to the Court for its review. The Minnesota Supreme Court opinion rests solidly on its interpretation of Minnesota law. It decided as a matter of policy that Minnesota would not enforce promises extending from a reporter to a source. The court then analyzed the doctrine of promissory estoppel, as it has developed in Minnesota, and, in *dicta*, stated that, had petitioner alleged a claim for promissory estoppel, the particular facts of this case would not support such a claim. The court's decision, firmly grounded in its interpretation of this state's law, presents no certworthy issue.

Additionally, this case presents a highly unique set of facts which, according to the testimony presented at trial, had not previously occurred and is unlikely to reoccur. The court fashioned narrow rulings dependent on the particular facts of this case. These rulings do not conflict with this Court's prior decisions or the principles on which those decisions are based. There is no conflict between this decision and decisions of the courts of appeal or other state courts of last resort. The petition should be denied.

I. THIS CASE DOES NOT INVOLVE IMPORTANT ISSUES REQUIRING THIS COURT'S REVIEW.

Petitioner would have this Court believe that it must involve itself in this action because important issues of law will otherwise develop without direction. However, the importance of this decision from a legal standpoint is grossly exaggerated.

Petitioner cites newspaper and journal articles which refer to the pervasive use of confidential sources in news gathering

and the potential impact of this lawsuit on reporter-source relationships. Cohen Petition at 6-11. Petitioner speculates that the decision of the Minnesota Supreme Court may cause tensions in those relationships.

In fact, no witness who testified at the trial of this action could recall an incident similar to that about which petitioner complained. (A-5). Most of the professional journals cited by petitioner discuss the professional and ethical questions raised by the use of confidential sources, not the impact of the breach of the promise of confidentiality. *See e.g.* E. Abel, Leaking: Who Does It? Who Benefits? At What Cost? 62 (1987). Those newspaper and magazine articles which presume that legal questions may cloud the reporter-source relationship do so simply because this lawsuit was filed and because of the lower court rulings in this case, not because a general problem has developed. *See e.g.* Washington Post, July 21, 1990, at A3, col. 1. The same is true of the legal commentary which petitioner cites. *See* D. Gillmor & J. Barron, Mass Communication Law: Cases and Comment 394 (West Pub., 5th Ed. 1990).

The few cases petitioner cites are so disparate in their facts and legal theories that no general principle can be fashioned. The only case involving the specific questions raised here was one brought by petitioner's counsel after the jury verdict was entered in this action. *Ruzicka v. Conde Nast Publications, Inc.*, 733 F.Supp. 1289 (D.Minn. 1990), *appeal pending*. The Minnesota Supreme Court applied Minnesota law to the peculiar facts of this case. Its ruling is meant to be narrow. As will be discussed below, the court was careful to limit the significance of its decision to the unique decision which faced the newspaper editors. Petitioner cannot point to any decision other than *Ruzicka* in which a court faced such circumstances. Even

Ruzicka highlights respondent's assertion that decisions of this nature are heavily influenced by the particular facts of each case. In that case, the court ruled that a purported promise of confidentiality was too ambiguous to be enforced. Thus, there is no evidence presented to support the claim that a *legal* controversy exists or will develop in the future.

Under these circumstances, if this Court accepted the petition it would only be involving itself in issues at yet ill-defined. Whether the questions raised in this case would ever rise to the level where supervision is necessary is wildly speculative.

II. THE DECISION OF THE MINNESOTA SUPREME COURT DISMISSING PETITIONER'S BREACH OF CONTRACT CLAIM CORRECTLY APPLIES MINNESOTA LAW, AND PRESENTS NO OTHER GROUND FOR THE GRANT OF CERTIORARI.

The Minnesota Supreme Court ruled in Part II of its opinion that the special relationship between a reporter and a source precludes the existence of a legally enforceable contract.[1] In doing so, the court grounded its decision on its interpretation of Minnesota contract law, and on its view of the public policy of this state. It is clear that such a ruling presents no certworthy issue.

Part II of the opinion addresses a relationship which is based on a moral commitment. The Minnesota Supreme Court

[1] It is unclear from the petition whether petitioner seeks review by this Court of Part II of the opinion below. Respondent's discussion presumes that petitioner disagrees with Part II. In Part I of its opinion, the Minnesota Supreme Court affirmed the decision of the Minnesota Court of Appeals that the trial court erred in failing to set aside petitioner's misrepresentation claim and punitive damage award. (A-6-7). Petitioner apparently does not challenge this ruling.

found that the breach of such a commitment, while it may be important to the parties, will not support an enforceable claim, since courts are unwilling to intrude on such relationships. *See Cruickshank v. Ellis*, 178 Minn. 103, 107, 226 N.W. 192, 194 (1929). The court viewed the relationship as ethical rather than legal.

> If the subject matter and terms are not such as customarily have affected legal relations, the transaction is not legally operative unless the expressions of the parties indicate an intention to make it so.

1 Corbin on Contracts §34, 138 (1963).

The court believed that the particular nature of such a relationship makes it exceedingly difficult to insure that an element essential to the formation of a valid contract, the meeting of the minds exists:

> The source, for whatever reasons, wants certain information published. The reporter can only evaluate the information after receiving it, which is after the promise is given; and the editor can only make a reasonable, informed judgment after the information received is put in the larger context of the news. The durability and duration of the confidence is usually left unsaid, dependent of unfolding developments; and none of the parties can safely predict the consequences of publication.

(A-9-10). Where the parties do not intend to form a contract, the court will not create one. *Linne v. Ronkainen*, 228 Minn. 316, 320, 37 N.W.2d 237, 239 (1949). *Cf. Johnson v. Blue Cross & Blue Shield of Minnesota*, 329 N.W.2d 49, 51 (Minn. 1983); *Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980).

This ethical relationship supplies no certainty as to the intent of the parties. As a matter of public policy, the Minnesota

Supreme Court believed that it was inappropriate to "impose a contract theory' on a "special ethical relationship." (A-10). Based on its view of Minnesota law, the court chose to include this relationship with others upon which it does not wish to intrude. *See e.g.*, Minn. Stat. §553.01, *et seq.* (contracts to marry). Petitioner has failed to establish the existence of any ground which satisfies his burden under Supreme Court Rule 17.1.[2]

III. THE DECISION OF THE MINNESOTA SUPREME COURT REJECTING THE DOCTRINE OF PROMISSORY ESTOPPEL AS A GROUND FOR PETITIONER'S CLAIM IS BASED ON A PROPER CONSTRUCTION OF MINNESOTA LAW, FOLLOWS PRINCIPLES ESTABLISHED BY THIS COURT AND DOES NOT CONFLICT WITH DECISIONS OF OTHER JURISDICTIONS.

At no time during the pendency of this case did petitioner plead, assert or argue that his claim was based on the doctrine of promissory estoppel. Nonetheless, since the Minnesota Supreme Court ruled that Salisbury's promise of confidentiality did not constitute an enforceable contract under Minnesota law, in *dicta*, it analyzed the circumstances surrounding the promise and publication of petitioner's name in the context of the common law doctrine of promissory estoppel. In Part III of its opinion, the Minnesota Supreme Court correctly rejected this theory as well.

---

[2] Despite Cohen's protestations to the contrary, the Contract Clause of the U.S. Constitution applies to legislative, not judicial, action. *Barrows v. Jackson*, 346 U.S. 249, 260 (1953). The three cases cited by Cohen involve legislative action. Thus, this basis for review must fail.

Under Minnesota law, the doctrine of promissory estoppel "implies a contract in law where none exists in fact." A promise not otherwise enforceable will be considered binding "if injustice can be avoided only by enforcing the promise." (A-10). The attractiveness of such a doctrine is that it provides "needed flexibility" in analyzing a particular event. *See Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740, 747 (Minn. 1983).

Clearly, then, an analysis of a promise under the doctrine of promissory estoppel will be inherently subjective. The doctrine calls for a facile judicial touch, since it is a "peculiarly equitable doctrine designed to deal with situations which, in total impact, necessarily call into play discretionary powers. . . ." Henderson, Promissory Estoppel & Traditional Contract Doctrine, 78 Yale L. J. 343, 379-80 (1969).

The Minnesota Supreme Court recognized the need to exercise such discretion in analyzing Salisbury's promise, since "the inquiry is into all the reasons why it [was] broken." (A-11). To the court, the facts of this particular case presented a transaction "fraught with moral ambiguity." In claiming moral superiority, petitioner relied on evidence of the strong ethical protection afforded the relationship of reporter and source, and on the damage he allegedly suffered as a result of the publication of his name.

Respondent pointed to the seamy aspects of petitioner's campaign "dirty trick" and to petitioner's attempt to manipulate the media. Respondent also presented evidence of the good faith attempt of its editors to resolve the ethical dilemma they faced. (A-4-5).

The court's analysis was affected by more than the morality of each side's actions, however. In examining the subjective events which would determine whether injustice would result

in this particular case from the failure to enforce the promise of confidentiality, the court also felt compelled to examine the editorial justifications for publishing petitioner's name.

> For example, was Cohen's name "newsworthy"? Was publishing it necessary for a fair and balanced story? Would identifying the source simply as being close to the Whitney campaign have been enough?

(A-13). The court concluded that, in this case, justice required balancing free press rights against the "common law interest in protecting a promise of anonymity." [3]

The analysis of the promissory estoppel theory used by the Minnesota Supreme Court does not conflict with decisions of this Court. Clearly, *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964) stands for the proposition that a state rule of law may not impose impermissible restrictions on free press rights. (A-12, n.6). State libel laws must reflect this constitutional interest. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, *reh. den.*, 467 U.S. 1267 (1984). Other causes of action are subject to First Amendment scrutiny. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (Intentional infliction of emotional distress); *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) (Invasion of privacy).

In attempting to answer the subjective questions raised by its analysis of Minnesota's promissory estoppel doctrine, the court recognized that it could not escape a review of the judg-

[3] From the inception of this case, respondent has argued that the courts cannot ignore First Amendment protection for the publication of truthful information on a political matter, and for the editorial decision to publish such information. Should this Court grant the petition for certiorari, respondent reserves the right to present such a question for its consideration, since this theory leads to the same outcome in this case.

ments made by respondent's editors. (A-13). The court would be required to decide whether it was appropriate to publish Cohen's name, knowing that his identity as the source of the information was known elsewhere. The court would have to confront the editors' concern that the voters should have this information prior to the election.

Such an exercise would conflict with this Court's view that the editorial process remain free from undue governmental restraint. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Given the facts of this case, the Minnesota Supreme Court did not believe that this was the rare circumstance where states should be allowed to punish the publication of truthful information. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). The court was mindful of the particularly sensitive nature of an intrusion into political speech and political campaigns present in this case. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776, *reh. den.*, 438 U.S. 907 (1978) (citing *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940)); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971).

At the same time, the court acknowledged that its task in viewing any claim in which conflicting constitutional interests are asserted is to balance those interests. It followed the lead of this Court, and refused to extend the existence of any rights beyond the "discrete factual context" of the case before it. *The Florida Star v. B.J.F.*, —— U.S. ——, ——, 109 S.Ct. 2603, 2607 (1989). The court did not create constitutional rights where none now exist. It merely applied established principles as a part of its analysis of the doctrine of promissory estoppel under Minnesota law. Its decision comports with the teachings of this Court.

Further, the other conflicts petitioner seeks to create do not exist. The opinion below does not conflict with this Court's pronouncement in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). *Seattle Times* stands for the proposition that a litigant who obtains information only by virtue of court ordered discovery must comply with legitimate restrictions the court places on its use. The state's interest in providing access to information to allow the litigants to prepare for trial is clear. Similarly, the state has a strong interest in protecting classified data which is obtained by a former Central Intelligence Agency employee during his employment, when that employee has signed a written employment contract. *Snepp v. United States*, 444 U.S. 507 (1980).

The Minnesota Supreme Court, in *dicta*, opined that, given the facts of this case, Minnesota's interest in protecting a promise of anonymity did not outweigh the damage which might be done to First Amendment interests if the court enforced this promise of confidentiality using the common law doctrine of promissory estoppel. (A-13-14). Clearly, the state's interest here is weaker than in *Seattle Times* and *Snepp*. At the same time, the first amendment interests which flow from the political nature of this case, and which protect the editorial decisions made here, are stronger than the "background" shots taken of a prisoner in *Huskey v. National Broadcasting Co.*, 632 F.Supp. 1282 (N.D.Ill. 1986).

The opinion of the Minnesota Supreme Court is extremely narrow. Under the highly unusual facts of this case, the court refused to apply a flexible doctrine of state law. It determined that it must at least consider First Amendment principles this Court has promulgated when analyzing whether the doctrine of promissory estoppel should be used to give effect to an otherwise unenforceable promise of anonymity. Petitioner has not identified one decision which conflicts with this narrow ruling of state law.

CONCLUSION

This case presents a set of facts unprecedented in the experience of every journalist who testified at trial. Petitioner sought to mold the alleged wrongful breach of an ethical undertaking into an action for breach of contract and misrepresentation. Minnesota courts applied Minnesota law to petitioner's claims, and found them lacking. These rulings, grounded on correct interpretations of state law, present no certworthy issues.

The Minnesota Supreme Court held that Minnesota contract law does not apply to a reporter's promise of confidentiality to a source. The court also explored the question whether the facts of this case would support a claim based on the common law doctrine of promissory estoppel, even though such a claim was never advanced by petitioner.

The court performed the flexible analysis required by Minnesota law. It determined, in *dicta*, that it would not enforce respondent's promise under these particular circumstances. In arriving at this conclusion, the court favored respondent's right and responsibility to publish accurate information on important political issues over petitioner's right to enforce a promise of confidentiality.

This interpretation of the doctrine of promissory estoppel is narrow in scope. It does not conflict with decisions of this Court. There is no indication that the "discrete factual context" of this case will be repeated. The opinion of the Minne-

sota Supreme Court does not present a certworthy issue. This Court should deny Cohen's petition for certiorari.

Respectfully submitted,

PAUL R. HANNAH
(Counsel of Record)
LAURIE A. ZENNER
HANNAH & ZENNER
1122 Pioneer Building
336 Robert Street
Saint Paul, MN 55101
(612) 223-5525

No. 90-634

IN THE

Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

PETITIONER'S REPLY MEMORANDUM

Elliot C. Rothenberg
3901 West 25th Street
Minneapolis, MN 55416
(612) 926-8185
Counsel for Petitioner

1990 — Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411 — 588-7506

IN THE

Supreme Court of the United States

October Term, 1990

No. 90-634

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

PETITIONER'S REPLY MEMORANDUM

In this case, a Minnesota jury awarded petitioner Dan Cohen $200,000 in compensatory damages and $500,000 in punitive damages after finding respondents liable for breach of contract and misrepresentation for violating promises of confidentiality given in exchange for desired information. The trial court denied motions for summary judgment and judgment notwithstanding the verdict. The Minnesota Court of Appeals affirmed the verdict for compensatory damages and the finding of breach of contract over respondents' First Amendment claims. The Minnesota Supreme Court, however, by a vote of four to two, held that a contract

cause of action was inappropriate and also held that Mr. Cohen could not recover under a contract implied through promissory estoppel on the grounds that it would violate the First Amendment rights of respondents.

Most of the issues raised by respondents already have been addressed in the petition. This brief will be confined to two matters.

Respondents claim that the opinion below was "meant to be narrow" and charge that the petition "mischaracterizes" a "carefully limited decision as 'empower[ing] newspapers to inflict injuries with impunity by deliberately breaking promises of confidentiality given for the purpose of obtaining desired information.'" Northwest Publications brief at 7, Cowles Media brief at 2-3, 5. The opinion said only that, "there may be instances where a confidential source would be entitled to a remedy such as promissory estoppel." A-14.

Moreover, respondents' claims are contradicted by previous statements by the Cowles Media counsel that the opinion below is more comprehensive. Media Law Reporter News Notes, Vol. 17, No. 34, July 31, 1990, at 3, attributed the following comments to Mr. Borger:

> He said that while he has concerns that the court did not firmly shut the door on promissory estoppel claims in regard to promises between reporters and their sources, it appears the number of claims where promissory estoppel would be recognized would be extremely limited.
>
> "The circumstances of this case, as Cohen would probably argue, presented some strong arguments on the plaintiff's side. If the court doesn't recognize (promissory estoppel) in this situation, I don't think they'll recognize promissory estoppel in many others," Borger said. "I think it's safe to say it'll be a very rare occurrence when a promissory estoppel claim gets very far."

While acknowledging that it has presented First Amendment arguments "from the inception of this case," respondent Northwest Publications claims that the treatment below of First Amendment issues was dicta apparently because the promissory estoppel doctrine was not previously raised in this case. Northwest Publications brief at 10, 12, 15. Nevertheless, the conclusion below (A-13-14), that enforcement of the promises to Mr. Cohen under a promissory estoppel theory would violate respondents' First Amendment rights, is a holding rather than dicta under any reasonable reading. It is irrelevant under what circumstances an issue was raised in the highest state court when the question was actually considered and decided. *Orr v. Orr*, 440 U.S. 268, 274-5 (1979).[1]

For the reasons stated above and in his petition, petitioner Dan Cohen respectfully requests that this Court grant a writ of certiorari in this case.

Respectfully submitted,

ELLIOT C. ROTHENBERG
Counsel for Petitioner
3901 West 25th Street
Minneapolis, MN 55416
(612) 926-8185

Dated: November 19, 1990

---

[1]The Northwest Publications brief also erroneously claims (at 4) that "the Whitney campaign acknowledged that Cohen was the source of the documents." The actual testimony was that a campaign official "insisted Whitney knew nothing of Cohen's plans to release the court records." Tr. at 1437, lines 16-18.

(10)

No. 90-634

IN THE

Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MINNESOTA

JOINT APPENDIX

ELLIOT C. ROTHENBERG
3901 West 25th Street
Minneapolis, MN 55416
(612) 926-8185
Counsel for Petitioner

PAUL R. HANNAH*
LAURIE A. ZENNER
HANNAH & ZENNER
1122 Pioneer Building
336 Robert Street
St. Paul, MN 55101
(612) 223-5525

STEPHEN M. SHAPIRO
MAYER, BROWN & PLATT
190 South LaSalle St.
Chicago, IL 60603-3441
(312) 782-0600
Counsel for Respondent Northwest Publications, Inc.

JOHN D. FRENCH
JAMES FITZMAURICE
JOHN BORGER*
FAEGRE & BENSON
2200 Norwest Center
Minneapolis, MN 55402
(612) 336-3000
Of Counsel:
RANDY M. LEBEDOFF
425 Portland Avenue South
Minneapolis, MN 55488
(612) 673-4600
Counsel for Respondent Cowles Media Company

*Counsel of Record

PETITION FOR CERTIORARI FILED OCTOBER 17, 1990
CERTIORARI GRANTED DECEMBER 10, 1990

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

INDEX TO JOINT APPENDIX

Pursuant to Rule 26.1, the following items are not reproduced herein, having previously been reproduced in the Appendix to Petition for Certiorari filed on October 17, 1990, at the referenced pages:

Chronological List of Relevant Docket Entries

December 23, 1982—Summons and complaint filed in Hennepin County District Court, State of Minnesota.

January 5, 1983—Defendant Cowles Media Company's answer filed.

January 17, 1983—Defendant Northwest Publications, Inc.'s answer filed.

February 25, 1985—Cowles Media Company's answer to amended complaint filed.

February 27, 1985—Northwest Publications, Inc.'s answer to amended complaint filed.

March 22, 1985—Amended complaint filed.

February 6, 1987—Hearing on defendants' motion for summary judgment.

June 19, 1987—Order and memorandum denying motion for summary judgment filed.

July 22, 1988—Date of jury's special verdict.

August 12, 1988—Findings of fact, conclusions of law, and order for judgment filed.

August 22, 1988—Hearing on defendants' motion for judgment notwithstanding the verdict or, in the alternative, a new trial.

November 19, 1988—Order and memorandum denying defendants' motions for judgment notwithstanding the verdict or a new trial filed.

December 9, 1988—Judgment of District Court entered.

June 12, 1989—Oral argument before Minnesota Court of Appeals on defendants' notices of appeal.

September 5, 1989—Opinion of Minnesota Court of Appeals filed, affirming in part and reversing in part judgment of Hennepin County District Court.

October 31, 1989—Order of Minnesota Supreme Court filed, granting petitions of all parties for further review of decision of Minnesota Court of Appeals.

March 13, 1990—Oral argument before Minnesota Supreme Court.

July 20, 1990—Opinion of Minnesota Supreme Court filed, affirming in part and reversing in part decision of Minnesota Court of Appeals.

October 17, 1990—Petition for writ of certiorari docketed in United States Supreme Court.

December 10, 1990—Order of United States Supreme Court entered, granting petition for writ of certiorari, limited to question 1 presented by the petition.

STATE OF MINNESOTA
COUNTY OF HENNEPIN

CASE TYPE: CONTRACT
DISTRICT COURT
FOURTH JUDICIAL
DISTRICT

DAN COHEN,

Plaintiff

vs.

COWLES MEDIA COMPANY, a corporation,
d/b/a MINNEAPOLIS STAR and TRIBUNE COMPANY
and NORTHWEST PUBLICATIONS, INC.,
a corporation,

Defendants.

Court File No. 798806

TRIAL EXHIBITS*

PLAINTIFF'S EXHIBIT NO. 21
7-6-88

(Reproduced from Star Tribune, October 28, 1982)

Minneapolis STAR and Tribune 1A Metro Thursday

Marlene Johnson arrests disclosed by Whitney ally

By Staff Writer

Court records showing that DFL lieutenant governor candidate Marlene Johnson was convicted more than 12 years ago

---

* The news articles involved in this case were introduced at trial as Plaintiff's Exhibits 21, 24, 25 and 39, and are reproduced typographically in the Joint Appendix at pages 1-12. Fifteen photocopies of the news articles themselves, as they appeared at pages A-1 through 5 of the Joint Appendix presented to the Minnesota Supreme Court, have been lodged with the Clerk of this Court.

on a misdemeanor charge of shoplifting were given to reporters Wednesday by Dan Cohen, a friend and political associate of IR gubernatorial candidate Wheelock Whitney.

The conviction, which Johnson said stemmed from her forgetting to pay for $6 worth of sewing items, was later vacated.

Cohen took copies of the court records to several news organizations, along with records showing that Johnson had been arrested for unlawful assembly shortly before the shoplifting charge. That case was later dropped.

Both Whitney and his campaign manager, Jann Olsten, said Cohen had acted without knowledge or permission of the candidate or his staff. Both said such information about a candidate's past ought to be available to the public before an election.

Olsten acknowledged that he learned Tuesday about Johnson's conviction. Whitney, on a campaign tour in northern Minnesota, said last night from Moorhead that "the first time I heard about it was this afternoon on the bus."

He added, "I don't recall talking to Dan Cohen in the last two months. I don't know how Cohen got the information about Johnson—he must have looked it up in the records."

Johnson, 36, said former Gov. Rudy Perpich knew about the incident when he chose her as his running mate, and that "we both agreed it didn't have any bearing on my qualifications today to be lieutenant governor."

DFLers, including Perpich, were quick to accuse Whitney's campaign of 11th-hour muckraking.

"This is an indication of the absolute desperation of the other side," said Perpich campaign manager Eldon Brustuen. "They're trying to find more to attack us on — their attacks so far haven't worked."

Perpich said he is proud of his running mate and has "absolute confidence" in her. "In the last 12 years, she's been in

business, a taxpayer, a good citizen, a very meaningful contributor to society . . . I just feel Minnesotans judge people on those things," he said.

He said he didn't know whether the revelations will harm the Perpich-Johnson campaign. Of its potential impact on his campaign, Whitney said, "I don't care if it could or couldn't backfire on my campaign . . . but I certainly think it's legitimate information."

Johnson's first arrest occurred in September 1969, when she and a half-dozen other Urban League protesters were arrested at a sewer construction site on Dayton Av. in St. Paul for refusing to leave a construction ditch. They were protesting the city's alleged failure to hire minority workers on construction projects.

The three counts of unlawful assembly against Johnson were dismissed on April 27, 1970 — the day her father, Buford Johnson of Braham, Minn., died.

The death of her father, whom she refers to in campaign speeches as a major influence in her life, left her "very upset," she said yesterday.

"I wasn't myself for quite a while. Within a month I lost 20 pounds, I got my first-ever speeding ticket, and, when I forgot to pay for $6 worth of buttons and sewing materials at the Sears store on Rice St., I was arrested."

The records indicate that she was arrested on May 25 and convicted on June 3, 1970. Sentencing was deferred until Feb. 6, 1971, when the conviction was vacated — a common practice in cases involving first offenders.

"The judge concluded that the situation did not reflect my past or what was expected to be my future," Johnson said. Because the conviction was vacated, she has no criminal record, she said.

Johnson heads the St. Paul advertising agency Split Infinitive, Inc., which she founded in 1970. Her campaign for lieutenant governor is her first bid for elective office.

Johnson has been a leader in small-business and women's organizations, in recent years heading the National Association of Women Business Owners, the DFL Small Business Task Force, the Minnesota delegation to the 1980 White House Conference on Small Business and the Minnesota Women's Political Caucus. In 1980, she won the St. Paul Jaycees' Distinguished Service Award for Community Service.

Cohen said the issue he hoped to raise by releasing the records "isn't whether Ms. Johnson has been convicted, but whether she tried to conceal it from the public."

Cohen, a former Independent-Republican alderman in Minneapolis who this year ran unsuccessfully for the Hennepin County Board, noted that when he was arrested for scalping a ticket at the Kentucky Derby three years ago, he publicized the incident immediately.

Cohen is an advertising executive with Martin-Williams, Inc., and assisted Whitney with production of some TV ads. He is not on the campaign payroll and does not sit on its steering committee. He and Whitney have been friends since 1957, when Cohen's father, the late Merrill Cohen, hired Whitney at J.M. Dain Co., now Dain Bosworth, Inc., the investment firm Whitney headed during the 1960s.

"The voters of this state are entitled to know that kind of information. Every day Perpich and Johnson failed to reveal it to them, they were living a lie," he said.

A check-out log of court records in the St. Paul Municipal Court archives indicates that files on the Johnson cases have been checked out only once in 1982 — on Tuesday, by Gary Flakne, former Hennepin County attorney and a former IR legislator.

Flakne said yesterday he heard "quite a while ago . . . through the grapevine" that Johnson had a criminal record. He said he could not say who gave him the information, or why he waited until this week to obtain copies of the documents.

A clerk in the archives, Robert Granger, said he remembers one previous inquiry about Johnson's records, several months ago. It may have been a telephone inquiry, Granger said, because it does not appear on the log.

Olsten said he first became aware of Johnson's conviction Tuesday, after Whitney's running mate, Lauris Krenik, was interviewed by Dick Pomerantz, host of a talk show on KSTP-AM radio.

Pomerantz, said yesterday that he has known for several months about the shoplifting case. He said he asked Krenik, "Suppose there was something in somebody's background 12 or 15 years ago, petty theft . . . Should that person be judged on that?"

He denied mentioning Johnson's name to Krenik. Olsten, however, said that Krenik left the broadcast with the understanding that Johnson had been convicted of petty theft.

Whitney said that when he heard of the matter yesterday, "I said, 'Where in the hell did that come from?' I understood it came from Dick Pomerantz."

Olsten said that as of yesterday afternoon, the Whitney campaign had no plans to mention Johnson's record in speeches or advertisements in the final week of the campaign.

"Certainly, a person's character and integrity are things people ought to look at when they vote for the second-highest office in the state," Olsten said. "I wouldn't presume to tell voters whether I think this is relevant to the campaign — I'd leave that up to them."

Whitney said, "I honestly think it's a legitimate piece of information and if it happened to my running mate, well, then people ought to know. Your past is part of your history. An accumulation of facts. It's absolutely legitimate to talk about."

PLAINTIFF'S EXHIBIT NO. 24
7-6-88

(Reproduced from St. Paul Pioneer Press, October 28, 1982)

St. Paul Pioneer Press Thursday, October 28, 1982 16D

Vacated conviction called 'irrelevant'

By Bill Salisbury
Staff Writer

A prominent Independent-Republican slipped copies of court records to reporters Wednesday showing that Marlene Johnson, DFL candidate for lieutenant governor, was convicted of shoplifting $6 worth sewing supplies 12 years ago — a conviction that has been expunged from her record.

Johnson confirmed the report and said it is "irrelevant" to the campaign. She said she told former Gov. Rudy Perpich about the incident before he selected her as his running mate.

"It's a last-minute smear campaign," Johnson said, charging that I-R gubernatorial candidate Wheelock Whitney was behind the revelation.

"Wheelock knew nothing about it," Whitney campaign manager Jann Olsten said. "It's a predictable response. If I were in her position, I'd try to shift the attention on someone else, too."

Perpich gave Johnson an "absolute" vote of confidence. "She told me about it; she told me about the circumstances,

and I just judged her on what I believe she can do as lieutenant governor," he said in a telephone interview from Winona.

Asked what political damage the revelation might have, Perpich replied, "I don't know. I just feel that Minnesotans judge people by what they do in society, and I believe that she has been a very meaningful contributor to society."

Johnson said the incident occurred at a time when she was distraught over the recent death of her father.

She said that on May 25, 1970, she walked out of the Sears store, 425 Rice St., with $6 worth of buttons and other sewing materials" without paying for it. She was arrested.

"I was very close to my father and was upset by his death," she said. "I was under stress — I had lost about 20 pounds — and I also got my first speeding ticket at about the same time."

Court records show Johnson was found guilty of petty theft on June 3, 1970, but that the conviction was vacated Feb. 6, 1971, without a sentence being imposed. Johnson said this means that "I do not have a criminal record."

She also confirmed a court record that she was arrested in 1969 for "unlawful assembly" for participating in a civil rights protest demonstration. The charge was dropped before the case went to trial.

Dan Cohen, a Minneapolis advertising and public relations consultant, gave the court records to at least three reporters, but asked that his name not be used. Cohen, a former I-R alderman who has run unsuccessfully for mayor and county commissioner, said he was delivering the records for another person, whom he declined to identify.

Olsten said Whitney knows Cohen, but Cohen is not involved in the Whitney campaign.

"We were not behind bringing this to light," Olsten said. "But regardless of how it became public, it goes to the honesty and moral character of the person involved."

Johnson said she was informed that the records were slipped to reporters by "someone close to the Whitney campaign." She declined to identify her source.

Johnson, 36, is the first woman chosen by a major party as its lieutenant governor candidate. She owns Split Infinitive, a St. Paul advertising and public relations firm.

PLAINTIFF'S EXHIBIT NO. 25
7-6-88

(Reproduced from St. Paul Pioneer Press, October 28, 1982)

Metro/Region D

Sloppy teen
She drives mom crazy
Dear Abby, Page 5D

Hope chests
A hopeless tradition?
Erma Bombeck, Page 5D

St. Paul Pioneer Press — Classified Ads in this section — Thursday, October 28, 1982

Perpich running mate arrested in petty theft case in '70

By Bill Salisbury
Staff Writer

Marlene Johnson, the DFL candidate for lieutenant governor, was convicted 12 years ago of shoplifting $6 worth of sewing supplies.

Court records concerning the conviction — which has been expunged from her record — were given to reporters Wednesday by a prominent Independent-Republican.

Johnson confirmed the report and said it is "irrelevant" to the campaign. She said she told former Gov. Rudy Perpich about the incident before he selected her as his running mate.

"It's a last-minute smear campaign," Johnson said, charging that I-R gubernatorial candidate Wheelock Whitney was behind the revelation.

"Wheelock knew nothing about it," Whitney campaign manager Jann Olsten said. "It's a predictable response. If I were

in her position. I'd try to shift the attention on someone else, too."

Perpich gave Johnson an "absolute" vote of confidence. "She told me about it; she told me about the circumstances, and I just judged her on what I believe she can do as lieutenant governor," he said in a telephone interview from Winona.

Asked what political damage the revelation might have, Perpich replied, "I don't know. I just feel that Minnesotans judge people by what they do in society, and I believe that she has been a very meaningful contributor to society."

Johnson said the incident occurred at a time when she was distraught over the recent death of her father.

She said that on May 25, 1970, she walked out of the Sears store, 425 Rice St., with "$6 worth of buttons and other sewing materials" without paying for it. She was arrested.

"I was very close to my father and was upset by his death," she said. "I was under stress — I had lost about 20 pounds — and I also got my first speeding ticket at about the same time."

Court records show Johnson was found guilty of petty theft on June 3, 1970, but that the conviction was vacated Feb. 6, 1971, without a sentence being imposed. Johnson said this means that "I do not have a criminal record."

She also confirmed a court record that she was arrested in 1969 for "unlawful assembly" for participating in a civil rights protest demonstration. The charge was dropped before the case went to trial.

Dan Cohen, a Minneapolis advertising and public relations consultant, gave the court records to at least three reporters, but asked that his name not be used. Cohen, a former I-R alderman who has run unsuccessfully for mayor and county commissioner, said he was delivering the records for another person, whom he declined to identify.

"The issue isn't whether Miss Johnson has been convicted of a misdemeanor, but whether she concealed it," Cohen said.

". . . every day that Miss Johnson failed to reveal her conviction and Mr. Perpich knew about it, they were living a lie." Cohen is not involved in the Whitney campaign at present, but was employed by Whitney as an advertising consultant for a time early this year, according to Olsten. He insisted Whitney knew nothing of Cohen's plan to release the court records.

"We were not behind bringing this to light." Olsten said. "But regardless of how it became public, it goes to the honesty and moral character of the person involved."

Johnson said she was informed that the records were slipped to reporters by "someone close to the Whitney campaign." She declined to identify her source.

Johnson, the first woman chosen by a major party as its lieutenant governor candidate in Minnesota, owns Split Infinitive, a St. Paul advertising and public relations firm.

PLAINTIFF'S EXHIBIT NO. 39
7-7-88

(Reproduced from Duluth News-Tribune & Herald, October 28, 1982)

DFL candidate arrested twice, records show

ST. PAUL (AP) — Court records showing DFL lieutenant governor candidate Marlene Johnson was arrested a dozen years ago for unlawful assembly and shoplifting were slipped to reporters Wednesday.

Johnson confirmed the information. She said both cases were dismissed or vacated and have no bearing on the campaign. Johnson said the information was given to former Gov. Rudy Perpich before she was chosen as his running mate.

She called it a "last minute smear" and blamed the tactic on the Independent-Republican candidate for governor, Wheelock Whitney.

Reached on the campaign trail in Fergus Falls, Whitney press aide Tom Mason said, "It wasn't us. We did not do it."

Perpich said by telephone from Winona that he has full confidence in Johnson.

Johnson, 36, said one case involved a protest over the alleged failure to hire minority workers for St. Paul city construction projects.

The count of unlawful assembly was dismissed in Ramsey Municipal Court on April 27, 1970.

Johnson said the second arrest, on May 26, 1970, came when she was distraught over the death of her father. She said she walked out of a Sears store with "six dollars worth of buttons

and sewing materials" without paying for it, and was arrested for shoplifting.

The shoplifting charge resulted in a misdemeanor conviction in June 1970. Sentencing was deferred. The conviction was vacated in February 1971.

(Caption omitted in printing)

DAN COHEN V. COWLES MEDIA COMPANY

Oral Argument Before the

Minnesota Supreme Court

March 13, 1990

(NOTE: The following unofficial transcript of oral argument before the Minnesota Supreme Court was prepared by counsel for respondent Cowles Media Company from a tape recording maintained by that court. Counsel for all parties received a copy of this transcript prior to its inclusion herein. A copy of the tape recording will be provided to this Court upon request.)

Popovich, C.J.: Mr. Borger, are you going to lead off?

Borger: Yes I am, your Honor.

Popovich, C.J.: I understand you are reserving five minutes for your rebuttal and Mr. Hannah is reserving five minutes also.

Borger: Yes. May it please the Court, my name is John Borger and I am here representing Cowles Media Company, publisher of the Star Tribune newspaper. Paul Hannah is also an appellant, representing appellant Northwest Publications, Incorporated, publisher of the St. Paul Pioneer Press. This case arises because a news source who was promised confidentiality by reporters from two newspapers complains because the editors at those newspapers decided to disclose his identity. The issues fall into three categories. I will be dealing with the contract issues of whether the oral discussions between the reporters and Mr. Cohen, the source, constitute a contract and whether, in this particular instance, the source suffered damages as a result of the disclosure of his identity, which damages are recoverable in contract. Mr. Hannah will be dealing with the misrepresentation issues of whether the evidence at

trial is sufficient to support a jury finding of misrepresentation and consequently an award of punitive damages. And I will also be dealing with the public policy and constitutional law issues of whether the theories of breach of contract and misrepresentation can be used to impose damages upon newspapers for publishing accurate newsworthy information about political affairs.

The facts in this case go back to the final days of the 1982 gubernatorial campaign. Mr. Cohen and other supporters of Independent Republican candidate Wheelock Whitney obtained copies of arrest records from 1970 having to do with some misdemeanor arrests of Marlene Johnson, who was then the Lieutenant Governor candidate and subsequently won that election. Mr. Cohen and his colleagues devised a plan which Judge Crippen below described as a "political scheme to broadcast a political attack, but at the same time to evade responsibility for the act." Mr. Cohen separately approached four reporters and obtained promises of confidentiality if he gave them information about the gubernatorial campaign. The four news organizations made different judgments as to how they handled that after they had obtained the information. Two, the St. Paul paper and Minneapolis paper, decided that Mr. Cohen had to be named notwithstanding that promise in order to give their readers the entire picture. Mr. Cohen, the day this newspaper article ran, was discharged by his public relations firm and Mr. Cohen then sued the newspapers for breach of contract and misrepresentation. The jury, which was not allowed to consider any First Amendment defenses, awarded $200,000.00 in compensatory damages and a total of $500,000.00 in punitive damages. The Court of Appeals last year affirmed the contract award but reversed the punitive award because as a matter of law on these facts there was no misrepresentation. All parties have appealed.

Your Honors, I submit that the contract award in this case must fall just as the misrepresentation claim fell and must fall as a matter of fact, as a matter of contract law and as a matter of state and federal constitutional law under the First Amendment to the United States Constitution and Article 1, § 3 of the Minnesota Constitution. The central error which permeates this entire case is that the court below perceived no constitutional dimension to the case. Yet contract theory, under these circumstances, interferes with three First Amendment rights of the press. It interferes with news gathering, because under this theory the court and jury will second-guess the manner in which reporters deal with their sources. It interferes with the editing process, because under this theory, the courts and juries will decide what information the editors should have left out and what they should have included in the story. Finally, it interferes with the publication of truthful, newsworthy information and it suppresses or punishes that publication.

The Court of Appeals analysis below, we submit, should be rejected because it is overly broad and deeply flawed, encouraging disgruntled sources to seek court intervention in all manner of alleged promises by the press. The first leg of the Court of Appeals analysis below was that there was no state action in enforcing contracts. I think the error in that can be demonstrated by comparing the United States Supreme Court decision of *Barrows v. Jackson*, in which the court said that once state sanctions are involved there is state action because it is no longer the party's voluntary choice to abide by an agreement, but the State's choice that the party observe the agreement or suffer damages. Contrast that, if you will, with the Court of Appeals' language below emphasizing this point, perhaps unintentionally, in which they describe large

damage awards as the most effective incentive for publishers to honor promises of confidentiality. The second leg of the Court of Appeals analysis was waiver. This is a factual issue which was not presented at trial. Even if it had been, the manner in which the Court of Appeals analyzed it gives undue weight to an oral representation of simply saying, "okay"; the reporter says "okay" to a source who asks for confidentiality. In contrast, other courts from the United States Supreme Court to Circuit Courts of the United States, have held that even written employment contracts do not constitute a full waiver of First Amendment rights—and that even as to the CIA agents, for example, in the *Marchetti* case. Finally, the court below attempted to balance contract rights against First Amendment rights and in doing so, we submit, gave undue weight to the contract rights, elevating contract as a theme to the level of a label which bears talismanic immunity —which of course the United States Supreme Court in *New Times v. Sullivan* said no legal theory is entitled to.

This case marks the first time that contract law has been applied to award damages on the basis of oral promises between reporters and sources. There is no compelling precedent in Minnesota to hold that this relationship actually constitutes a contract and in our briefs we have gone through a number of common law rules which would allow the court to find that under these circumstances, it just was not a contract, so that you would not have to reach the First Amendment issues. There are among those grounds the public policy issue as to whether you want to have the courts involved in this sort of regulating agreements between private parties. The legislature, as a matter of public policy, has abolished actions for breach of promise to marry and for alienation of affections. Courts can and have refused to enforce adoption contracts

that would not be in the best interest of the child, as a matter of public policy. We submit that, in this instance, the courts should refuse to enforce reporter and source agreements that are not in the best interests of the public. The public policy at issue here is also embodied in the First Amendment. The First Amendment requires more, much more, than a simple balancing of interests. The government can justify interfering with the publication of truthful information about a matter of public significance only upon a need to further a state interest of the highest order. Here, of course, the information was truthful. It clearly was about a matter of public significance—namely the gubernatorial campaign—and there is no need, in this instance, to further a state interest of the highest order.

Simonett, J.: What weight do you give the fact that the newspaper put a self-imposed restriction of not revealing the source? Doesn't that have to be weighed in the balance, too?

Borger: There is a weight to that, Your Honor, which I submit falls within the professional balaneing at the newspaper. The Minnesota Free Flow of Information Act, the shield law, if you will, creates a privilege for journalists to refuse to disclose the identity of their sources under court compulsion, in most instances; there are some exceptions. The public policy which the statute sets forth at the beginning is: "in order to protect the public interest and the free flow of information." That is not a protection that is given separately to the sources and court cases from around the country which we have cited in our brief—the *Cuthbertson* case, the *Boiardo* case out of New Jersey—hold that the privilege is one that belongs to the journalist and not to the source. Even if the source wants to compel the journalist to talk about it, he can't. The journalist has a privilege to withhold it. The jour-

nalist in the situation in dealing with confidential sources is having to make judgment calls on a very rapid basis as to what information should be withheld from the public in order to obtain other information to present to the public. And the balance is struck in favor of maximizing the flow of information to the public. In most instances, in almost every instance, the journalist who grants confidentiality does so in the belief and the intent that granting confidentiality will increase the flow of information to the public, but it is not something that is granted just for the interests of the source. It is serving the interest of the public in obtaining information and that is the interest that the editors at the *Star and Tribune* and the editors at the *Pioneer Press* were attempting to serve in their decision, difficult as it was, to disclose Mr. Cohen under all the circumstances of this case. The calculus that they went through, as reflected in the testimony at trial, was that by the time they were making their decision the story was already out from the Associated Press about the Marlene Johnson arrests. Ms. Johnson had claimed that this was an attempt at muckraking by the Whitney campaign and the Whitney campaign was saying it had nothing to do with it. The information as to who had disclosed the story to the various reporters was also circulating and had gone to the Whitney campaign by one of Mr. Cohen's colleagues. Mr. Flakne, who was part of the effort to obtain the records in the first place, told a different reporter at the *Star and Tribune* that he had obtained it for Mr. Cohen. The information was coming out from a variety of sources. It would have been really giving the public less than all the information that they needed to assess just where the information was coming from, had they given any sort of veiled reference to some part of the Whitney cam-

paign, because the Whitney campaign was denying it and Mr. Cohen was not an official part of the Whitney campaign.

Simonett, J.: The promise of the confidentiality that you're talking about, did that relate in any way to the information that was conveyed; that is, they were not to reveal anything that was contained in the criminal records about Marlene Johnson?

Borger: No, Your Honor.

Simonett, J.: It just dealt with the source?

Borger: It dealt strictly with the identity . . .

Simonett, J.: I tell you what troubles me. What's newsworthy about revealing Cohen's name?

Borger: The role that Mr. Cohen was playing in this particular effort was to increase deniability by everybody involved. If you go back to the trial court testimony, none of the people who came up with the scheme to disseminate this information about Ms. Johnson wanted anything to do with it, wanted any credit for it. Mr. Flakne is pointing to Professor Ismach and Mr. Cohen, Mr. Cohen is pointing to the other two, Ismach is saying: "it's these guys who were involved in it" when it came to trial. They all realized that there was going to be some backlash to this. The Whitney campaign wanted to deny any involvement but wanted the benefit from having the information spread. What was newsworthy, what the public had to understand, was how close to the Whitney campaign the source of the information had been. It would have been unfair to the Whitney campaign to have said that he was an official part of that campaign, because he was not, although he was working for the campaign through the public relations firm.

Simonett, J.: The paper was free to say that the source was a source close to the Whitney campaign. Is that right? Am I right?

Borger: Your Honor, that is one approach they considered and an approach they rejected, in weighing the editorial balance, because of the ambiguity of that particular term and I submit that what you are doing in this inquiry, just as the Court of Appeals did below, is delving into the editing function at the newspapers when you decide "you could have said this, you could have said that." These are all choices that editors are to make under our system and under the First Amendment, and not for courts to make years after the fact.

Simonett, J.: What was the purpose in publishing Cohen's employer, employer's name?

Borger: Again, Your Honor, it simply was a part of presenting the entire picture to the public. There was no intent, there is no testimony that the publishing of that name was intended to deprive him of his employment.

In terms of the need to further a state interest of the highest order, I submit that there is no need because this is not a widespread problem. This is the only instance in which either of these papers have ever identified a source and there are intense professional pressures to keep the source confidential. Through contract law, Mr. Cohen is asking this court to hold that once a promise of confidentiality has been made, courts will intercede to protect the privacy claim of the source no matter what the public's interest may be in the disclosure. As applied below, contract theory permits no consideration of First Amendment defenses or of the newsworthiness of the information published.

I submit, Your Honors, that the appropriate rule in this case, as in the *Hustler Magazine v. Falwell* case, is that plaintiffs who suffer loss of reputation and related damages due to the publication of information about matters of public significance may not recover without showing the publication

contains a false statement of fact which was made with the required level of fault. Here there was no false statement of fact; your inquiry can end there. But no matter what rule you ultimately adopt, if you recognize any First Amendment interest at all in the circumstances of this case, you must reverse the judgment below, because the trial court gave no consideration to the First Amendment and allowed the jury to give no consideration to the First Amendment. Thank you.

Popovich, C.J.: Mr. Hannah. Might I ask the audience, we've had a lot of people coming and going this morning and I know we have visitors from schools and that and some of the people that were slated to be here couldn't get in. I would ask that there be no more moving in and out until we're through with the case. It's very disconcerting for the justices to be listening at the same time and seeing all this traffic. I would appreciate the audience's cooperation. Okay, Mr. Hannah, you may proceed.

Hannah: Thank you, Your Honor. May it please the court, my name is Paul Hannah and I represent Northwest Publications, Inc., one of the appellants in this case. Mr. Cohen's case below included a claim for fraudulent misrepresentation. The Court of Appeals set aside that claim and also set aside the $500,000.00 punitive damage award which the jury had imposed. I will deal primarily with these issues, although of course, if you have any other questions, I would be more than willing to deal with them.

In order to prove fraud, Mr. Cohen has the burden of affirmatively proving the existence of each of the elements of the cause of action. And one necessary element is that the alleged misrepresentation relate to a past or present fact. This element simply does not exist in this case. The representation involved the reporter's promise that Cohen's name

would not be used in any future article they wrote. This is a promise of a future intention. As such, it cannot be the basis of a fraud action. Otherwise, any broken promise or every disputed contract would also be the basis of a fraud claim. We have cited two cases that I believe graphically demonstrate the significance of this principle. *Hayes v. Northwood Panelboard* and *Maguire v. Maguire*. In *Maguire v. Maguire*, a father promised to leave a two-thirds interest in some property to his children if they settled a lawsuit involving the property. Later, the father bequeathed the property to the children's new stepmother. Because there was no intent to defraud when the promise was made, no fraud claim existed.

In this case, there was no representation of a past or present fact by the reporters. Their promises were of a future intention. There also was no evidence that the reporters planned or intended to break their promises at the time they made them. In fact, Mr. Cohen himself testified that the reporters (1) were truthful; (2) intended to honor those promises; and (3) made no false statements to him during the course of their meetings. In addition, there is no evidence that the editors of the newspapers at the time the promises were made had any intention of any sort with respect to the promises. Mr. Cohen argues that fraud may be inferred in this case from the repudiation of the promises shortly after they were made, and he cites a 1924 case, *Guy T. Bisbee*. But *Bisbee* merely recognizes that it is sometimes difficult to prove the intent of a promissor at the time the promise is made. It is an evidentiary holding. Here, the intention of the participants is not in dispute and it's not in doubt. The reporters had every intention of keeping their promises to Mr. Cohen. Therefore, there is no need to refer to the evidentiary presumption that was set forth in *Bisbee*. Mr. Cohen tries to salvage this

argument by alluding to the short time between the promises and the editorial decisions to publish his name. In the life of a typical news story, these decisions were not unusual and the timing wasn't short. Hundreds of articles, literally, everyday, have lives that span approximately 12 hours. The decisions in this case occurred in the same time frame as the vast majority of those articles. So the timing is not significant. And, again, there is no significant evidence, in fact, there is no evidence, to show that the intention at the time the promise was made was to do anything other than to honor the promise.

Mr. Cohen has several alternative arguments. First, he asserts that agency principles somehow support his claim. But his cases involve situations in which agents made fraudulent misrepresentations which were then imputed to the principals. Here, the agents, the reporters, made no fraudulent misrepresentation. Mr. Cohen also argues that appellants in their support of shield laws and in their support of the protection of First Amendment principles have somehow defrauded him. This position cannot serve as the basis of his claim. First of all, any such representation made five years ago by an editor of the *St. Paul Pioneer Press Dispatch* or three years ago or ten years ago by an editor of the *Star Tribune* is, like the reporters' promises, a representation of a future intent. And, second, appellants' concern, their concern for shield laws is not a representation to Mr. Cohen on which he can rely. And, third, there is absolutely no evidence in the record that Mr. Cohen, in fact, relied on these concerns of the appellants for the rights of sources. In fact, the evidence is that Mr. Cohen was no neophyte in matters of editorial decision-making. The case law is also clear that this privilege belongs to the press. For all those reasons, Mr. Cohen's attempt to balance his fraud case on this kind of representation simply will not succeed.

Finally, Mr. Cohen argues that the reporters misrepresented their authority, and that is not true. The facts in the case are that the reporters had the authority to make the promises they make. Editors were also aware that these promises were made by reporters from time to time in the course of their work. And, in fact, this circumstance that somehow a promise implies the authority to make the promise is true in every case where a promise is made of a future intent. So, for example, I make a promise that I will do something in the future, by the way, is left unsaid, I may break that promise. So to find that there is a basis for Cohen's fraud claim with this argument means again, that any promise, any disputed contract will now be the basis for a fraud claim. There simply is no legal or factual basis for that claim.

And, finally, the issue of punitive damages, again, has no basis in law or in fact. Punitive damages cannot be imposed in a breach of contract action. There is no independent tort and the facts of this case certainly do not provide any evidence of willful, wanton or malicious conduct. Thank you.

Popovich, C.J.: Mr. Rothenberg?

Rothenberg: Thank you, Your Honor. May it please the court, my name is Elliot Rothenberg. I represent plaintiff and respondent Dan Cohen in this action. I would like to respond to the arguments posed by appellants in the following order: First, to take the fraud and misrepresentation claim addressed by Mr. Hannah and then the contract and First Amendment issues raised by Mr. Borger. First, just as an introduction, however, I would like to point out that there are many factual disputes in this case that were resolved by the jury in Mr. Cohen's favor. For example, the claim that Mr. Flakne had told a reporter named Mr. Anderson something about what Mr. Cohen had done, aside from the promise given by the

reporters. This was rejected by the jury and we would submit that it is far too late to re-try these factual issues before this court. In addition, defendants had throughout the case, at least in the trial, concentrated on attacks on Mr. Cohen's character and motives, alleged character motives in presenting this information to reporters and, again, this was rejected by the jury, and, in fact, there was considerable evidence before the trial that the reporters had welcomed this information. There was an editorial in the *Pioneer Press Dispatch* saying that the information provided by Mr. Cohen was relevant, that the campaign itself should have presented this information and that too much was being made of the source of this information. So we would submit that these issues have been already resolved by the jury in Mr. Cohen's favor and ought not to be re-presented to the Supreme Court. In addition, the standard for review of special verdicts and judgments NOV, that all the presumptions have to favor what the jury had done and also the trial court in rejecting the petition for judgment NOV, and, consequently, as far as the fraud and misrepresentation claim is concerned, that the presumption should be in favor of the jury verdict and in favor of Judge Knoll's rejection of the motion NOV, and not in favor of the decision of the Court of Appeals overturning the verdict on misrepresentation and by extension of punitive damages.

We would submit, Your Honors, that the flaw of the Court of Appeals' decision regarding fraud and misrepresentation was the failure to address the substantial evidence relating to the misconduct of the editors and employers of the reporters in this case. It may well be true that the reporters did have the intention of keeping their promises to Mr. Cohen when they had agreed to his condition of confidentiality prior to his presenting the court documents to them. What's critical

here ought to be not the intentions of the reporters, who in fact had no power to carry out their promises, but rather the intentions of the editors, Mr. Hall, the executive editor of the *Pioneer Press Dispatch* who made the decision to identify Mr. Cohen, and Mr. Finney of the *Star Tribune* who made the same decision. Mr. Hannah said that not every breach of promise, not every breach of contract is misrepresentation or fraud. There's no question about that. However, a breach of contract and a breach of promise can be fraud when one, there was never any intention on the part of the parties agreeing to the contract to honor and abide by the contract and, two, where there is a misrepresentation, one or more misrepresentations, misstatements of fact and we would submit that both applied in this case. The evidence is very clear on the part of the *Pioneer Press Dispatch* and Mr. Hall was commendably candid on the issue. What did he say? He said that as soon as he learned of the promise given by Mr. Salisbury to Mr. Cohen, he decided right on the spot, basically, to identify Mr. Cohen, to name Mr. Cohen in the *Pioneer Press Dispatch* article. In fact, he said on direct examination from his own attorney, Mr. Hannah, he testified that he had never considered it, never considered doing any other way than identifying Mr. Cohen. And, he and Mr. Salisbury's direct supervisor, Doug Hennes, testified that he made the decision without even consulting with Mr. Salisbury and without even considering the pros and cons of the matter. So the evidence is clear that the *Pioneer Press Dispatch* editor, the person who had the power to decide whether or not to identify Mr. Cohen, decided immediately, never had any intention of abiding by the promise of his reporter Mr. Salisbury to Mr. Cohen. And the same applied to the Minneapolis *Star Tribune* as well. The *Star Tribune* claims that they reached a decision after some time

of consideration among the editors. There is much conflicting testimony on this point, I should point out, for example, there is evidence that they reached the decision in considerably less time than they claim to. But, perhaps, what is most important that in his testimony, Mr. Finney testified that he had never made a decision to honor the promise. The first and only decision he ever made on this issue was to identify Mr. Cohen and dishonor the promise made by his reporter Ms. Sturdevant to Mr. Cohen. Now, in the cases cited by Mr. Hannah and to certain extent by Mr. Borger as well, these cases indicate that there is fraud or misrepresentation when (1) there is no intention to honor the contract and (2) when the contract, the promise, is basically not made in good faith on the part of the party making the promise. Here, the Court of Appeals did not find any good faith on the part of appellants' editors in breaking their promises to Mr. Cohen. And, we would submit, that the anger and the opposition on the part of the reporters to the dishonoring of their promise, far from showing good faith on the part of the appellants who broke the promises, only accentuates the lack of good faith on the part of the editors who broke these promises. Now, it would have been one thing, if the editors had decided that the reporters should not have made the promises to Mr. Cohen and said, well, you shouldn't have made the promise to Mr. Cohen, we're not going to run the story, give the documents back to Mr. Cohen and forget about the whole thing. However, the court should not allow the appellants, should not create a precedent allowing these appellants to use reporters to obtain and secure full performance on the part of another party, the other party to the agreements and then to claim that the same reporters did not have the authority to carry out their own obligations, which is basically what happened here. And, incidentally, the re-

porters were not only given the authority to secure the obligation, to secure the performance of Mr. Cohen, but when the editors decided to dishonor the promise to Mr. Cohen they then dispatched the same reporters to try to get Mr. Cohen to withdraw from the agreement, particularly on the part of Ms. Sturdevant. Ms. Sturdevant called Mr. Cohen once, asked Mr. Cohen, will you give us consent to run your name despite the promise that we'd given you. Mr. Cohen said no. Ms. Sturdevant called him a second time, said my editors wanted me to call you again to see if you'd give the consent to withdraw from our agreement with you. Mr. Cohen again said no. She may have called even a third time. So, even after the request, Mr. Cohen said no, they still decided they were going to run his name and identify him as the source. And, the *Pioneer Press Dispatch* also instructed Mr. Salisbury to call Mr. Cohen and to inform Mr. Cohen of the decision of the editors and Mr. Cohen objected to that as well and still they ran his name. So we would submit, Your Honor, that the critical intention here that was overlooked by the Court of Appeals was not the intention of the reporters. The reporters may well have wanted to keep their promises, but when they went back to their editors, the editor says no, for the first time, as Mr. Borger admitted, for the first time, we are going to say that you do not have the authority to carry out your promise of confidentiality to a person to whom you made the promise.

Simonett, J.: Do you agree that the reporters had every intention of carrying out their promises at the time they made them?

Rothenberg: Your Honor, the evidence does indicate that, yes. The evidence indicates that the reporters did have the intention, did act in good faith. We would submit, that the

reporters according to the evidence would have agreed to do this, would have had the intention.

Simonett, J.: Is there any evidence that the reporters at the time they made their promises knew or should have known that the editors would not back them up?

Rothenberg: Your Honors, we would submit that the reporters should have known of any policies. In fact, this is one of the issues at the trial level where trial counsel for appellants at that point, claimed that the reporters did not in fact have the authority and that they should have gotten approval of the editors before making the promise. Now, they seem to have abandoned that position at this level. But, we would submit that, regardless of whether the reporters knew or not, that there is duty owed to inform Mr. Cohen. In fact, what Mr. Cohen testified is that when he talked to the reporters, he relied on what he thought was their authority to bind the newspapers, that if he had known that the reporters could not by their own actions bind the newspapers, he wouldn't have given them the information or he could have gone to an editor, Mr. Finney or Mr. Hall, but basically, he said that had he known that the reporters could not bind the newspapers by their own promise, had he known that editors could revoke promises of confidentiality, he would not have dealt with the reporters, he would not have accepted their promises. And . . .

Coyne, J.: Counsel, isn't this argument antagonistic to your contention that there was a contract here? Sounds to me as if you're saying there was never any meeting of the minds.

Rothenberg: No, Your Honor, and let me explain why it's been our position that the reporters did have the authority to make the promises, the actual authority as pointed out in the Court of Appeals and certainly the apparent authority to make

these promises, that this has been going on, that these promises are made quite frequently, promises of confidentiality. In fact, Ms. Sturdevant testified she makes these promises once a week. Mr. Salisbury testified that he makes them quite frequently. There was substantial testimony on the part of editors and reporters that this is one of the major ways in which newspapers obtain information, is by promising confidentiality to sources in order to obtain information. And, notice in the reply brief of Mr. Borger there is a reference to the latest edition of Gillmor and Barron's Mass Communication Law 1990 edition and on page 394, where he cited some information on this case, Gillmor and Barron says that anonymous sources account for 30% to 50% of news gathering. So, we would submit, that there was indeed the authority and certainly the past practice of obtaining information by means of promising confidentiality, and that both reporters testified that is the very first time in their long careers as reporters that any promise of confidentiality had ever been revoked by an editor.

So we would submit there, Your Honor, that there indeed was the authority, that the past practice, and that gets into the second part of the misrepresentation issue as well. And that is, that through the past practices and representations that appellants held out their reporters as having authority to bind them unilaterally by promises of confidentiality. There was considerable testimony that obtaining news by promises of confidentiality is a way of business, a way of life of newspapers and indeed, the media generally, and that many, many stories are obtained through confidential sources, including stories regarding political candidates, that this is a way of life, of the newspapers. In fact, Dean Ismach of the University of Oregon School of Journalism testified that it's a sacred

trust that, once a reporter makes a promise of confidentiality, that reporter speaks for the news organization and is a sacred trust to honor those promises. In fact, in the brief before the Court of Appeals, Cowles Media again referred to it as a sacred duty that once the promise is made that these promises have to be honored, that's far more than a mere contract. And, the editor of the *Pioneer Press Dispatch* at the time John Finnegan in an editorial written about a year before the situation arose which is at the heart of this lawsuit, said that the violation of a promise of confidentiality would be "a dirty trick," those were his words, it would be "unscrupulous," that was his word, it would show "no concern for fairness and integrity," again his words, and he said that he would not hire someone who would do such a thing, and that's exhibit 76, is a column of October 4, 1981. And, in addition, the appellants have pushed for the adoption of shield laws like the Minnesota Free Flow of Information, which basically protect the rights of reporters not to have to identify their confidential sources in response to court orders—another way of encouraging sources to provide confidential information to them. All this is part of what is called the golden rule of investigative reporting as testified to by Linda Cole, who is a reporter for the *Pioneer Press Dispatch*, that once you promise a source of information confidentiality, you do not betray that promise. In addition, the appellants have written many articles and editorials, they have been submitted as evidence, condemning judges who have ordered reporters to disclose their confidential sources and have sent reporters to jail for refusing to disclose these confidential sources. That all of these we would submit, Your Honors, are part of a representation of past practice to any confidential source, including Mr. Cohen, that once a promise is given of confidentiality that promise is

going to be honored and that the public ought to have the right to rely on these representations and that if this representation is violated—the very first time this has happened, certainly by these newspapers—and that that ought to constitute fraud and misrepresentation on their part, and if the appellants do not intend to keep such agreements, do not intend to allow reporters to make them, they have the duty and obligation to inform the public that these promises of reporters are subject to review by editors and that sources deal with the reporters at their own risk. None of this was done in this case. Perhaps, Your Honors, I could now go to some of the First Amendment issues unless there are any questions from the court on this issue and here I would like to . . .

Wahl, J.: Counsel, before you go on. Why shouldn't this decision as to whether a promise is honored or not be an editorial decision, rather than a decision of the court?

Rothenberg: No, Your Honor, we would submit that it should not and the reason is that this would create a privilege for newspapers which no one else in society has. That when an agent makes a promise on behalf of a principal, the principal has the obligation to honor that promise. That applies to anyone else in society, any other business or institution in society and that newspapers ought not to have the right, the only institution in society, ought not to have the right to dishonor and violate promises which were voluntarily entered into.

Wahl, J.: But the public interest that's involved to me, the greater public interest than even possibly individual contract rights, is the right of the public to have accurate information and, particularly, to have information with regard to their elective processes. And why isn't it against public policy to say that you can enforce such a contract, if indeed it is a contract?

Rothenberg: Let me respond in this way, Your Honor. This is not the first time that a newspaper has obtained information on a candidate in response to a promise of confidentiality. The substantial evidence, has been done in many, many other cases, for example, where promises were honored. Case involving Geraldine Ferraro's parents where information was given on a confidential basis. Forty years earlier her parents had been convicted on some gambling charges. There was confidential information late in political campaigns on Governor Wendell Anderson, leaking of a report where the appellants had congratulated themselves on obtaining this information. There was information on Senator Joseph Biden in committing plagiarism 20 years earlier. There was a long article on civil lawsuits against Robert Mattson obtained from confidential sources, all this just a few days before the election. And, we would submit, that in this case, Your Honor, all that Mr. Cohen provided the reporters with copies of court documents.

Wahl, J.: Counsel, there are other ways in which he could have gotten those into the hands of the reporters, aren't there? He chose to have himself identified with the giving of the information.

Rothenberg: Your Honor, he did demand the promise of confidentiality before he would give the information. And the reason he did this rather than slip them under the door or something of that sort, was that he felt that once a promise of confidentiality was given, that the reporters and the institutions who gave those promises could be trusted and we would submit that a person does have the right to trust that promise and a contract once made will be honored and enforced by the courts, if necessary.

Simonett, J.: Let's take up your contract theory. For how long would this promise have to be kept, under this contract?

Rothenberg: The promise was not, the contract, of course, did not specify the period of time. However, however long it should have been kept, certainly it should have been kept longer than the few hours or the few minutes it took appellants to violate that contract.

Simonett, J.: Let's say, then, sometime thereafter, KSTP Channel 5 approached Mr. Cohen and said were you the one who released that information and he said no—which would be untrue. Could the St. Paul or Minneapolis newspapers, would they then be released of their promise of confidentiality?

Rothenberg: Your Honor, we would submit, that in terms of this contract, they would not be released, if that should take place. The contract clearly provided, in fact, there's no question here as to the wording of the contract, that they would not disclose the name of the person who gave them this information.

Simonett, J.: Would the law then be being used to support deceit by a contracting party?

Rothenberg: We submit that in this case, nothing like this ever happened, Your Honor. Mr. Cohen has never been accused of lying to any news organizations, the appellants or any other one. So, but in that hypothetical situation, which of course does not exist here, I think one would have to look at the circumstances, but I would submit that just on these facts, that if the person gives information on a confidential basis, he does not want to be identified, he fears the loss of his job, he fears other retaliation if he is identified, that he ought to have the right not to be linked with that information, but. . . .

Simonett, J.: All right, now one other question. I know the time is getting short. If the Minneapolis newspaper learned

that Cohen was the source or was told that Cohen was the source of the information independently of the transactions. . . . Once it had learned from Mr. Flakne that he had given the information to Mr. Cohen, did that release it from the promise, as a matter of contract?

Rothenberg: Your Honor, if I could address first about the part about Mr. Flakne. Mr. Flakne in the trial denied that he had said anything of the sort to the *Star Tribune* reporter, Mr. Anderson. And, Mr. Anderson said that he had written something to that effect, that Mr. Flakne had told him, but that never made its way into the final article. So we would submit, Your Honor, that the jury was entitled to find that Mr. Flakne in that disputed, with those disputed facts, that Mr. Flakne had never told anyone at the *Star Tribune* that Mr. Cohen was distributing this information. And, indeed, Ms. Sturdevant indicated in her own testimony that there was no other independent information linking Cohen to the information either. But, I'm sorry, Your Honor. . . .

Simonett, J.: The light is red. I wonder if you could just give me a very quick answer on the other part of the question?

Rothenberg: On the hypothetical part of the question?

Simonett, J.: Yes.

Rothenberg: Just hypothetically speaking, we would submit that that once the promise is made, that the newspaper has willingly made an agreement in order to obtain information and they ought to be held to their contracts, that, again, they are demanding a right possessed by no one else in society, the right to make contracts, the right to obtain full performance on the part of the other party to contracts, and then the right to unilaterally dishonor their own agreements. And, we submit that there is no precedent for this, that the appellants are really asking for the unprecedented decision here to free

them from the law of contracts which binds everyone else in society and that's why we say that general contract law ought to apply here, that the appellants have no First Amendment right, ought to have, ought to be given no right purportedly under the First Amendment to be above the law. My time is up, I believe. Okay. Thank you.

Popovich, C.J.: Rebuttal.

Borger: Let me address some of the questions that Justice Simonett put to Mr. Rothenberg. First, as to the law being used to support deceit as to a contract action, that in fact could have happened in the *Newsweek* and Oliver North situation. You recall that *Newsweek* identified Mr. North as the source of certain information about a raid on Libya after Mr. North had accused Congress of leaking like a sieve and being untrustworthy to obtain security and classified information. *Newsweek* did that because Mr. North was being hypocritical and they burned that source on that basis. Had Mr. North brought such a contract action here, contract law would be used to support a deceitful activity by a public official. We are not claiming, as Mr. Rothenberg would have you say, that this is a privilege that applies only to the press, as contract law not applying in this sort of mutual promise situation. There are all sorts of personal situations in which someone comes up and says I know something about somebody and if you promise not to tell anybody, I'll tell you what that is. If someone breaks that in the backyard gossip situation, are you going to have a contract cause of action in that situation?

Simonett, J.: This is more than backyard gossip, though, this is, don't you think, it's within the business of newsgathering between the source and the reporter?

Borger: Your Honor, under the *Florida Star* situation, if the interest of the source of the information in keeping that confidential is to be protected, you would have to extend it to the backyard gossip situation, too, because you can't have a rule that applies just against the press. *Florida Star* also makes the point that it would be a perverse result that truthful publications challenged pursuant to a particular cause of action—there, a privacy statute, here, a contract—are less protected by the First Amendment than even the least protected defamatory falsehoods.

Yetka, J.: Doesn't that depend a little upon what the practice has been? The question here is, is whether there was an expectation that if a promise was made by a reporter, it would be kept. Now, is it your position that there was no past practice to that effect, that there was no binding right of a reporter to assure a source of confidentiality. It seems to me that's one thing; if there was such a policy, that's another. Was there or was there not such a policy?

Borger: Your Honor, clearly it was past practice of the papers to recognize promises of confidentiality and to keep them, as a matter of professional ethic, not as a matter of contract law. If this had been perceived as a matter of binding contract at the newspapers, then they would have gotten around the problem as Justice Simonett suggested; once Gary Flakne revealed that Cohen was his source to Mr. Anderson, they would have used Mr. Anderson's version in the publication.

Yetka, J.: But then how was the public, how was the public to know that that was merely an ethical rule and not a binding practice?

Borger: Your Honor, as a matter . . .

Yetka, J.: It's obvious to all of us that if there were such a practice, and people rely upon it, that this case has sure done a lot to destroy that kind of confidence. And so, I suppose that—and there hasn't been much discussion on the part of any of the attorneys of this case as to whether if there had been even a practice, a custom in the trade—that there could be an equitable estoppel of some kind to protect people who give this information to a newspaper reporter with every indication that it was never going to be used, that the source would never be used. Now, that's a little different than an outright contract, but there are equitable estoppel cases, and it hasn't even been discussed.

Borger: No, it hasn't been discussed, Your Honor. And, I do think that it is a matter of professional ethic rather than law. It is a matter of professional ethic that brings newspaper reporters and editors to go to jail rather than obey a court order to disclose a confidential source. What kind of a contract requires one of the parties to disobey the court? This is something that is extracontractual, and I agree with Mr. Rothenberg that it approaches a sacred trust, but that puts it into the realm of personal obligation, not legal obligation. Under *Seattle Times v. Rhinehart*, the United States Supreme Court case that dealt with confidential restrictions on information obtained through the discovery process, the court was very careful to say that that restriction applies only to the extent you obtain the information through discovery. If you get the information from some other manner, the First Amendment keeps the court from forbidding disclosure of that same information. And I think the same situation would apply here. If you got into strict contract analysis, once David Anderson obtained the information from Gary Flakne, the contract wouldn't fly. But the editors weren't

looking at it as a matter of contract law and that's why they asked Mr. Cohen to waive his promise. They were looking at it as a matter of professional ethic and professional responsibility. They should be punished, if they are going to be punished, because of criticism from their fellow professionals, because of distrust from the public, as a matter of professional ethic, not as a matter of law which brings the courts into determining, not just in this case what the promise actually was, but if you follow your proposal, Justice Yetka, equitable estoppel gets into a very amorphous ground and would have the court and the jury deciding just exactly what the practice was, because it varies from paper to paper. Where exactly do we draw the parameters of this right on behalf of the source? And just how intrusive are we going to have the courts be into the editorial process? Thank you, Your Honor.

Popovich, C.J.: Mr. Hannah?

Hannah: Thank you, Your Honor. From the point of view of the question of fraudulent misrepresentation, I would first of all like to direct the court to our discussion of the facts in the briefs. I think that you will find a circumstance involving the editors of both newspapers quite different from that which was represented to you by Mr. Rothenberg. In point of fact, at the *Pioneer Press Dispatch*, there was a policy that a reporter should seek to consult with an editor before making a promise of confidentiality, that given the practical effect of the reporters' interaction with their sources, that policy, that if possible the reporter should approach the editor, was a policy which was sometimes followed and which sometimes could not be followed. And the evidence was clear that editors were aware that the peculiar circumstances of the interaction between reporters and their sources would mean that the promise would be made many times without prior discussion

with an editor. And, I think, Mr. Justice Yetka, that that is a particular answer to your concern.

Yetka, J.: Well, the only problem with it, is this: that it's obvious from the arguments and these briefs that Mr. Cohen was very sophisticated in dealing with the press. As a matter of fact, he's dealing in public relations at this time.

Hannah: And was then.

Yetka, J.: And yet he thought there was a policy that if he was guaranteed confidentiality that that would be kept. Now, we're being told that was not a policy, it varied from newspaper from newspaper and he was not entitled to rely on it. Now, if a man as sophisticated as Cohen relied upon it, what would be the attitude of an ordinary citizen who, fearful of his or her job, offers information that might be helpful in disclosing fraud in government or something else, and being faced with the situation that was presented here by having their names disclosed?

Hannah: I think that you raise a question that we've had to deal with on a professional level, that our clients have had to deal with, since this case. I don't believe that the position of these appellants or of the press, or protestations of reliance by Mr. Cohen, who knew to a large extent what he was getting into, means that suddenly a fraud cased appears where in fact the practice up to this particular circumstance had been that those promises would be honored.

Yetka, J.: And yet the newspaper contacted him at least twice to see that if he would consent?

Hannah: That's correct.

Yetka, J.: So at least he had some indication that his understanding of the policy was correct, that confidential information sources would not be disclosed and he denied them that right, and apparently relied upon his assumption as to what

the rule was. Now we're being told it's an editorial right, the reporters had no right to make those commitments. If there was such a, my point is, if there was such a policy, it seems to me—whether there is fraud or not, that's a separate question—but, if there was such a policy that there's at least some basis for a contractual obligation, whether based on equitable estoppel or something else, that he was entitled to rely on that commitment.

Hannah: Your Honor, what I would posit is this: the circumstances of this case, the first case in which either one of these appellants has broken a promise, were such and the testimony was such that the editors felt under all the circumstances—and again, we've outlined those circumstances in the brief—that they were required to name Mr. Cohen in order to provide the voters with accurate information some six days before the election. That particular circumstance is the only one now before the court. I understand the court's concern and my point is, is simply that a contract or fraud in the circumstances, in the peculiar circumstances, of this case can't simply be determined by what the past practice was. That if we're going to start to look at the relationship between Mr. Cohen and the *Pioneer Press Dispatch* and the *Star Tribune* to determine legal responsibilities, then we have to look at them all. And our argument to this court and to the Court of Appeals, in fact to the trial court, was that the only way to look at all those circumstances, including the past practice, was to look at it in the context of the editorial decision being made by the people at the *Star Tribune* and the *Pioneer Press Dispatch*, the circumstances and their understanding of their obligation under the First Amendment. And we weren't able to argue that. I recognize your concern, and my point simply is that if you begin to look at our practice,

then I think you have to look at that practice in the context of our exercise of not only First Amendment rights, but also the obligation that we have and that we've tried to delineate in our brief to make sure that people aren't given veiled sources if those editors firmly believe that some information is going to be provided to those people and it won't be accurate. Those editors, for example,—I'm sorry, thank you, Your Honor.

Popovich, C.J.: Very good discussion by both parties today. I should make that announcement.

---

(7)

No. 90-634

IN THE

Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MINNESOTA

BRIEF OF PETITIONER

Elliot C. Rothenberg
3901 West 25th Street
Minneapolis, MN 55416
(612) 926-8185
Counsel for Petitioner

PETITION FOR CERTIORARI FILED OCTOBER 17, 1990
CERTIORARI GRANTED DECEMBER 10, 1990

QUESTION PRESENTED FOR REVIEW

Does the First Amendment of the U.S. Constitution grant newspapers immunity from liability for damages caused by dishonoring promises of confidentiality given in exchange for information on a political candidate?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statute:

Other Authorities:

IN THE

Supreme Court of the United States

October Term, 1990

No. 90-634

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MINNESOTA

BRIEF OF PETITIONER

REPORTS OF OPINIONS IN THIS CASE DELIVERED BY COURTS BELOW

The opinion of the Minnesota Supreme Court (A-1) is reported at 457 N.W.2d 199 (Minn. 1990). The opinion of the Minnesota Court of Appeals (A-19) is reported at 445 N.W.2d 248 (Minn. App. 1989). The Order and Memorandum of the Minnesota District Court denying defendants' motion for judgment notwithstanding the verdict or new trial (A-61) is reported at 15 Med. L. Rptr.

2288 (Minn. Dist. Ct. 1988). The Order and Memorandum of the Minnesota District Court denying defendants' motion for summary judgment (A-77) is reported at 14 Med. L. Rptr. 1460 (Minn. Dist. Ct. 1987).

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Judgment of the Minnesota Supreme Court was dated July 20, 1990. Petition for writ of certiorari was docketed in the United States Supreme Court on October 17, 1990. Certiorari was granted on December 10, 1990. Jurisdiction of this Court is conferred by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . .

Amendment XIV. § 1 . . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

On October 27, 1982, Dan Cohen, then working for Minnesota Republican gubernatorial nominee Wheelock Whitney in his position as public relations director of a Minneapolis advertising agency, contacted reporters of Minnesota's two largest newspapers — the Star Tribune of Minneapolis and the St. Paul Pioneer Press. In separate meetings with each reporter, Mr. Cohen stated:

> I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and you will also agree that you're not going to pursue with me a question of who my source is, then I'll furnish you with the documents. A-3, A-21-22.

Mr. Cohen demanded commitments of confidentiality because he feared retaliation. A-3.

The reporters were experienced journalists covering the gubernatorial election who knew that he was an active Republican associated with the Whitney campaign. They agreed to his conditions and promised him confidentiality. A-3.

Mr. Cohen then gave each authentic copies of public court records documenting Democratic lieutenant governor candidate Marlene Johnson s arrest for unlawful assembly in 1969, her conviction of petit theft in 1970 and the 1971 vacating of it. A-3-4.

Star Tribune reporter Lori Sturdevant told Mr. Cohen, "This is the sort of thing that I'd like to have you bring by again if you ever have anything like it." Pioneer Press reporter Bill Salisbury told him the documents were "political dynamite." A-23.

Mr. Cohen also contacted reporters from the Associated Press and WCCO-TV (the Minneapolis CBS affiliate) and gave them the same documents after each promised him confidentiality. A-4, A-22-23.

The Associated Press and WCCO-TV honored their promises. The former published a story without identifying

Mr. Cohen; the latter did not broadcast the story. A-4, A-26; Pl.Ex. 39, R. 393-94; J.A. 11-12.

In contrast, after being informed of the promises to Mr. Cohen, editors of the two newspapers decided to use the documents supplied by him but to renege on these promises.

The executive editor of the Pioneer Press Dispatch, David Hall, quickly decided to disclose Mr. Cohen's identity after learning of his reporter's promise and testified, "Honestly, I don't think that we ever considered doing it another way other than using his name." R. 1428-30, 1440, 1457, 669; A-25.

Star Tribune editors also decided to disclose Mr. Cohen's identity, despite Ms. Sturdevant's promise. According to their testimony, the decision was made by a group convened by an editor in the afternoon called a "huddle." A-24. Ms. Sturdevant was not part of the "huddle" and had no other input into whether her promise was to be honored or dishonored. A-24.

Even so, Star Tribune editors instructed her to ask Mr. Cohen to release the Star Tribune from what editor Frank Wright called "this agreement." A-24. R. 1490. She telephoned Mr. Cohen two or three times, but each time Mr. Cohen refused to allow his name to be published. The editors did so anyway. A-24.

Both Ms. Sturdevant and Mr. Salisbury objected strongly to this dishonoring of their promises. Ms. Sturdevant demanded that her name not appear on the published story. A-5, A-24, A-25.

The next day, October 28, both newspapers published articles about Ms. Johnson's arrests and conviction which identified Mr. Cohen as the source of the information. The Star Tribune's front page article also named Mr. Cohen's

employer. A-6, A-25, P1.Ex. 21, R. 194; P1.Ex. 24 and 25, R. 197-98; J.A. 1-10.

Mr. Cohen was fired the day the articles were published. A-6.

The following day, the Star Tribune published a column attacking Mr. Cohen for supplying the documents to the newspaper. A-6, P1.Ex. 26, R. 209, 211. The day after that, the Star Tribune published an editorial cartoon depicting Mr. Cohen as a garbage can labeled "last minute campaign smears." A-6, Pl.Ex. 22, R. 213-14.

On October 31, the Pioneer Press and on November 1, the Star Tribune published articles containing additional criticism of Mr. Cohen, attributed to his former employer, for giving the court documents to the newspapers. Pl.Ex. 27 and 28, R. 214-17.

None of these articles disclosed that the newspapers had made and had broken promises to Mr. Cohen.

Sometime after Mr. Cohen was fired, the University of Minnesota hired him to produce some recruiting brochures. R. 229. On November 20, 1982, the Star Tribune published a column criticizing the University for employing Mr. Cohen. Pl.Ex. 23, R. 230. Information on Mr. Cohen's work for the University came from a confidential source never identified by defendants. R. 867-68. The columnist testified that it would be unwise for any public agency to hire Mr. Cohen and would not deny that his article would discourage other public agencies from giving work to him. R. 907-12. Before the article was published, the Star Tribune writer had called University officials and had questioned why they would use someone like Mr. Cohen. R. 405-7.

Some editors testified that they broke defendants' promises to Mr. Cohen because they deemed his identification

newsworthy. A-5, A-13, A-34, brief of Northwest Publications, Inc. in opposition to petition for certiorari at 5. However, one participant in the Star Tribune "huddle" testified that he would have honored the promise to Mr. Cohen if his newspaper had the story on an exclusive basis. R. 978-79, 1038-39.

David Nimmer, who has served as managing editor of the Minneapolis Star (a predecessor of the Star Tribune) and later as associate news director of WCCO-TV, testified that the newspapers "hung Mr. Cohen out to dry because they didn't regard him very highly as a source." R. 494. A former editor-in-chief of the Minneapolis Star testified that Mr. Cohen "was treated badly" by the defendants. R. 642.

On October 29, 1982, the Pioneer Press published an editorial, "Relevant Disclosures," which said that "too much is being made" about the source of the documents supplied by Mr. Cohen and that whether the Whitney campaign was involved was "irrelevant. To focus on how the information got to the public's attention is to overlook a larger issue. That is, the information about the lieutenant governor candidate, Marlene Johnson, is something the voting public deserves to know. . . . [I]t is legitimate to examine her past as part of an assessment of her fitness for public office." P1.Ex. 29, R. 218-19.

A few months earlier, a May 30, 1982, Star Tribune column took the position that public disclosure of the names of persons who commit crimes, especially public figures, is appropriate regardless of any resulting personal humiliation. R. 964-65.

Substantial evidence was presented at the trial of the media's dependence upon confidential sources. Ms. Sturdevant and Mr. Salisbury have given promises of confidentiality on a regular basis for many years. A-36. Ms. Sturdevant testified that she has personally made promises of confidentiality at least once a week and that it was a common practice. R. 448.

Star Tribune executive editor Joel Kramer testified that many articles on a daily basis contain information obtained from confidential sources. "It is part of the business and it occurs every day." He agreed that the newspaper gets many stories from confidential sources which it otherwise would not have. R. 1191-92, 1225.

Dr. Arnold Ismach, Dean of the University of Oregon School of Journalism, testified that frequently information cannot be obtained without promises of confidentiality which he termed "one form of currency that journalists use to get something they want and need, which is information." R. 695-96. He said that promises of confidentiality from investigative and political reporters are especially common, and that information on political candidates often comes from confidential sources not supporting the particular candidates. R. 690-93. He pointed out that a confidential source, "Deep Throat," exposed the Watergate scandal. To this day, his or her identity has not been disclosed. R. 694. Dr. Ismach testified that exposing the names of confidential sources would cut off the free flow of information to the public. "If sources who are willing to provide information on the basis of anonymity found that they could not trust those agreements, journalists feel, and I certainly agree, that those sources would dry up . . . . [T]he public is the ultimate loser." R. 716.

Another expert witness, Bernard Casserly, testified that the use of confidential sources is pervasive and is "a way of life" in the profession of journalism. R. 1279. At least

33 percent of newspaper stories and up to 85 percent of all news magazine sources have veiled attribution. R. 1278. High government officials often provide information only after first receiving promises of confidentiality, and 30 percent or more of the interviews in Washington, D.C. are off the record. R. 1267-68, 1278-79. Mr. Casserly testified that sources often seek promises of confidentiality because they fear loss of their jobs and other reprisals. He said that editors are or should be well aware of the consequences, such as loss of employment, if they dishonor promises of confidentiality. R. 1272, 1277, 1281-82; A-43.

Mr. Nimmer testified that the supply of factual but embarrassing information by confidential sources late in political campaigns is a common practice and has happened in every campaign he could recall. He said that many times such disclosure from political opponents is the only way in which the media obtains information to inform the public about the qualifications of candidates. R. 504, 506.

Witnesses employed by defendants testified that disclosing the names of sources promised confidentiality would reduce the flow of information to the public and would be unethical as well.

Past executive editor and current vice president and assistant publisher of the Pioneer Press, John Finnegan, criticized in a column a judge for saying "that he didn't believe that forcing newsmen to reveal sources or produce notes and tapes would hamper their ability to gather news. HIS POSITION IS RIDICULOUS. Of course, the inability of newsmen to protect their confidential sources and unpublished information will affect newsgathering operations. Sources will tend to disappear." Pl.Ex. 79, R. 1619-21 (emphasis in original).

In another column, Mr. Finnegan declared that a judge "ignored the law" by jailing a reporter for refusing to reveal his confidential sources to the court in a murder case he was investigating. He wrote, "If newspeople cannot keep sources confidential, those sources can dry up." Although one charged with a crime may need the best evidence to defend himself, "it is also clear that unless there is some protection of the right to gather news and protect sources, the quality and flow of news will be seriously impaired." Pl.Ex. 77, R. 1593-94.

Linda Kohl, a longtime investigative reporter for the Pioneer Press, agreed that reporters should not mislead or double-cross confidential sources, because "they're the ones who keep you in business." R. 1246.

Mr. Salisbury, who had allowed his name to appear on the Pioneer Press articles identifying the plaintiff, testified that some of his previous sources have been reluctant to give him additional information after his newspaper dishonored his promise to Mr. Cohen. R. 424.

Ms. Sturdevant testified that her editors' decision to dishonor her promise to Mr. Cohen could have adversely affected her credibility in being able to carry on her job as a reporter. R. 452.

About a year before the newspapers broke their promises to Mr. Cohen, Mr. Finnegan published a column in which he said that the violation of a promise of confidentiality would be a "dirty trick" and "unscrupulous," showing no concern for fairness and integrity, and that he would not hire someone who would do this. Pl.Ex. 76, R. 1590-91.

Many states have adopted shield laws protecting journalists from court orders to disclose confidential sources. In seeking passage of these laws, journalists have argued that

without such protection, the press and the public could not acquire information from sources requiring confidentiality. R. 696-97. Mr. Finnegan said that shield laws "are especially important in the field of investigative reporting where sources may fear for their lives, their jobs or the safety of their families if their identities are revealed, particularly in highly sensitive cases." R. 1592.

Defendants lobbied for adoption of the Minnesota shield law called the Minnesota Free Flow of Information Act. A-18 n.1. Minn. Stat. § 595.022 entitled "public policy" states that the public interest and the free flow of information require protection of the confidential relationship between reporter and source. It provides:

> In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information. To this end, the freedom of press requires protection of the confidential relationship between the news gatherer and the source of information. The purpose of sections 595.021 to 595.025 is to insure and perpetuate, consistent with the public interest, the confidential relationship between the news media and its sources.

Mr. Cohen sued the newspapers for breach of contract and misrepresentation. The trial court, in its opinions denying defendants' motions for summary judgment and judgment notwithstanding the verdict, ruled that the First Amendment did not bar this action. A-66-69, A-79, A-86-88.

Finding liability on both claims, the jury awarded Mr. Cohen $200,000 in compensatory and $500,000 in punitive damages. A-2.

The Minnesota Court of Appeals, by a vote of two to one, affirmed the verdict of compensatory damages for breach of contract over defendants' First Amendment arguments. It reversed, however, the finding of misrepresentation and therefore the award of punitive damages, because Minnesota law does not allow punitive damages for breach of contract without an independent tort, A-7, A-41-42. Nevertheless, the Court of Appeals held that certain evidence was admissible "to show that the Tribune was acting with willful indifference to his rights and was continuing to disparage him while failing to disclose its own breach of promise." It also held that closing argument "comments on the newspapers' ignoble motivations are not unduly prejudicial." A-44.

The Minnesota Supreme Court, by a vote of four to two, reversed the compensatory damages award. It first held that a contract cause of action was inappropriate for promises of news source confidentiality even with the existence of an offer, an acceptance, consideration, and a breach and the intention of the promisors to keep their promises. A-7-10. It then held that, despite Mr. Cohen's injuries from reliance upon the newspapers' promises, enforcement of these promises under a contract implied by a promissory estoppel theory would violate the newspapers' First Amendment rights. A-11-14. "Of critical significance in this case, we think, is the fact that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign." A-13. The opinion said that there may be instances where a source may be entitled to a remedy for a broken promise of confidentiality, "when the state's interest in enforcing the promise to the source outweighs First Amendment considerations," but did not

indicate under what circumstances the First Amendment would not override such promises. A-14. Each dissenting justice wrote a separate dissent. A-14-18.

SUMMARY OF THE ARGUMENT

This case raises the issue of whether the First Amendment empowers newspapers to inflict injuries with impunity by deliberately breaking undisputed and unambiguous promises of confidentiality in conducting their business of acquiring information. Journalists often can only obtain important information regarding government, politics, and other subjects by promising not to disclose the source's name.

The First Amendment protects the press from governmental coercion only. It is not applicable to suits for damages for the violation of voluntary promises not to publish certain information in exchange for other information possessed by private persons. No state action exists where a court fairly determines the intent of promisors and reaches a legal conclusion regarding the promises in terms of the neutral and nondiscriminatory rules of contract law.

This Court already has held that the First Amendment does not bestow a right to publish information in violation of obligations willingly incurred through an agreement or through the acceptance of conditions by which the information was obtained. *Snepp v. United States*, 444 U.S. 507 (1980); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). This Court also has recognized the importance of protecting expectations based on promises in return for goods or services provided in reliance upon them. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

When newspapers voluntarily give promises inducing others to provide goods or services, they waive any claimed

First Amendment right to evade their own obligations under the bargains. The newspapers' agents making the promises of confidentiality to Mr. Cohen were experienced reporters who knew of his background and knew the type of information he was to provide them. They understood that they were waiving the right to publish a potentially newsworthy item in return for obtaining another potentially newsworthy item.

Newspapers cannot employ the First Amendment to thwart a remedy for acts which would be unlawful when committed by anyone else. The First Amendment does not give the press a special privilege to violate the rights of others. *Branzburg v. Hayes*, 408 U.S. 665 (1972). In particular, the First Amendment does not protect the press from liability for calculated falsehoods, even in the course of covering political campaigns. *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S.Ct. 2678 (1989).

The First Amendment does not give newspapers an automatic right to publish truthful information if it was acquired unlawfully. *The Florida Star v. B.J.F.*, 109 S.Ct. 2603 (1989).

Denying an injured person recovery for harm caused by the dishonoring of a promise would deprive him of the protection of the law without any countervailing benefit to the interest of the public in being informed. The media depend upon confidential sources for much of the news. In order to preserve the free flow of information, Minnesota and many other states have adopted shield laws to protect journalists from compelled exposure of confidential sources. Conferring upon newspapers a constitutional right to unilaterally violate promises of confidentiality would discourage potential sources and deny the public access to important information.

ARGUMENT

I.

THE FIRST AMENDMENT DOES NOT ABROGATE VOLUNTARY PROMISES OR AGREEMENTS BY NEWSPAPERS.

A. The First Amendment only protects newspapers from governmental compulsion and does not apply to their voluntary conduct.

The First Amendment does not allow newspapers to escape the consequences of injuries inflicted upon others by repudiating promises they made voluntarily without governmental compulsion or any other duress.

In this case, the jury, the trial court, and two appellate courts have found that defendants injured the plaintiff by violating promises given to obtain information for use in their newspapers. The Minnesota Supreme Court called the dishonored promises "clear-cut," "without dispute," and "unambiguous." A-9, A-11. The jury found clear and convincing evidence that defendants not only violated plaintiff's rights but that their conduct showed a willful indifference to his rights. A-76. The Minnesota Court of Appeals upheld the admissibility of certain evidence showing that the Star Tribune was "acting with willful indifference to his rights and was continuing to disparage him while failing to disclose its own breach of promise" and also upheld closing argument comments on the defendants' "ignoble motivations." A-44. Even the opinion below said that "to break a promise of confidentiality which has induced a source to give information is dishonorable." A-8. Still, the Minnesota Supreme Court accepted the newspapers' argument that the First Amendment barred the jury from granting and the lower courts from upholding relief to Mr. Cohen.

The First Amendment protects the press from governmental action only. It is not a tool to undo bargains agents of media corporations entered into with private persons. Unlike that of the Minnesota Court of Appeals (A-28-31), the opinion below disregarded the difference between governmental coercion and private voluntary conduct. *See Board of Education of Westside Community Schools v. Mergens*, 110 S.Ct. 2356, 2372 (1990).

In holding that the First Amendment barred enforcement of defendants' promises, the Minnesota Supreme Court relied upon *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), which struck down a requirement that newspapers publish replies to charges against candidates. A-13. However, the present case involves no governmental compulsion over editorial judgment but, rather, the exercise of that judgment through a voluntary promise of confidentiality in return for desired information, a common business practice. Indeed, *Miami Herald* distinguished between consensual conduct and governmental coercion and stressed that it is the latter which implicates the First Amendment. 418 U.S. at 254. A later case, *Herbert v. Lando*, 441 U.S. 153, 167 (1979), held that *Miami Herald* "neither expressly or impliedly suggest[s] that the editorial process is immune from any inquiry whatsoever."

The Minnesota Court of Appeals (A-31) reasoned that contract law is "fundamentally different" from the application of state law of defamation to newspapers which has been held to constitute state action under the First Amendment. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). Unlike defamation cases, rules of contract law do not restrict any particular published speech and serve purposes unrelated to the content of expression.

Contract law allows the press to choose — without governmental interference — the material to be the subject of its promise in exchange for something it wants from another party. The newspapers here voluntarily agreed not to publish certain information — the identity of Mr. Cohen — in order to obtain other information possessed by the source. Awards of contract damages do not sanction the contents of articles but instead compensate for injuries caused by the failure to honor a voluntary promise.

Newspapers do not have a First Amendment right of access to information possessed by Mr. Cohen or any other confidential source. *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). They can acquire information from these sources only by means of a voluntary business transaction where anonymity is promised in return. Dean Ismach, R. 694-95.

As pointed out above in the statement of the case, journalists testified that promises of confidentiality are frequently used in conducting their business of obtaining information.

The petition for certiorari at 6-10 also discussed how dependent the press is upon confidential sources of information. Journalism executive and educator Richard M. Clurman has said that eliminating the use of confidential sources would carry a price "so high as to be unacceptable, not only to the press but to the public. Full disclosure would eliminate much of the most valuable information and insights that regularly appear in news stories." Abandoning the use of confidential sources would deprive the public of "a large percentage of the valuable, accurate and important stories that appear in print and on the air." R. CLURMAN, BEYOND MALICE: THE MEDIA'S YEARS OF RECKONING 158 (1988). In particular, a promise of confidentiality is "typically the price that a journalist must pay to

secure meaningful information about the operation of government for dissemination to the public." Langley & Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 Geo. Wash. L. Rev. 13, 26 (1988). "When it comes to stories that count, i.e., those that are embarrassing to government officials and politicians, the use of confidential sources is often a necessity." Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 Colum. Hum. Rts. L. Rev. 57, 74 (1985).

The newspapers were under no governmental compulsion to make their promises of confidentiality to Mr. Cohen. On the contrary, they exchanged these promises voluntarily for the valuable consideration of information. The First Amendment is not implicated where a jury and court fairly determine the intent of promisors and then reach a conclusion regarding the promises in terms of the neutral and nondiscriminatory rules of contract law. *See Evans v. Abney*, 396 U.S. 435, 446 (1970).

Defendants are asking, in effect, for an unprecedented interpretation of the First Amendment to convert it into a regulatory instrument to rewrite or supersede agreements bargained for by media organizations, to the prejudice of those who have relied upon voluntary promises of the media and have fully performed their part of these agreements.

B. Newspapers do not have a constitutional right to evade obligations they voluntarily assumed through contracts or other conditions they accepted in order to obtain information.

The Minnesota Court of Appeals held that it was not "an undue burden to require the press to keep its promises." A-35.

Similarly, this Court has held that the First Amendment does not bestow a right to publish information in violation of obligations willingly incurred through an agreement or through the acceptance of conditions by which the information was obtained.

Snepp v. United States, 444 U.S. 507 (1980), held that a voluntary agreement not to publish is enforceable over claimed First Amendment rights. The decision stripped a CIA official of profits from a book published without CIA prepublication review as required by his employment agreement and upheld an injunction against future breaches of it. The Court rejected Mr. Snepp's claims that the First Amendment allowed him to violate the agreement.

> In his petition for certiorari, Snepp relies primarily on the claim that his agreement is unenforceable as a prior restraint on protected speech. When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress. 444 U.S. at 509 n.3.

The Court indicated that the enforceability of Mr. Snepp's agreement was not limited to the publication of information classified to protect national security (which his book did not contain) but that it applied to all information about his employer. 444 U.S. at 511, 515 n.11.

The trial court found that the relationship between journalist and source of information is not anything other than commercial, and it held that their agreements should be subject to laws governing commercial relationships. A-66. The Minnesota Court of Appeals held that an agreement

to provide the press with information, like any other service, is an appropriate subject matter for the law of contracts. The First Amendment does not render newspapers immune from the law for violating commercial contracts for goods and services. They should not be exempt from liability when they break promises made for the purpose of gathering news. "We find no reason to provide less protection to the reasonable expectations of a newspaper informant than we would to any other party to whom the newspaper makes a promise." A-33.

This Court has not previously addressed the specific issue of the relationship of the First Amendment to newspaper promises to confidential sources. It has, however, recognized the importance of protecting expectations based on promises in return for goods or services provided in reliance upon them. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978), acknowledged "the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them."

The Supreme Court also has rejected claims of a First Amendment right to publish information received on condition of confidentiality. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), upheld an order prohibiting the publication of confidential information, covered by a protective order, obtained through discovery. "The critical question that this case presents is whether a litigant's freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted access to that information and placed restraints on the way in which

the information might be used." 467 U.S. at 32. The decision quoted from *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965), "The right to speak and publish does not carry with it the unrestrained right to gather information." 467 U.S. at 32.

Trial judge Franklin Knoll found that defendants broke their promises to Mr. Cohen "after thoroughly considering what they were about to do." He held that no First Amendment interest exists in protecting "the knowing and willful breach of a legally sufficient contract after hours of thought and discussion by corporate officers," conduct which "can fairly be characterized as a calculated misdeed." A-68-69.

The creation of a constitutional privilege to renege on the obligations of voluntary agreements is not required to ensure freedom of the press and instead would be in conflict with important values. *See Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695, 2707 (1990).

II.

DEFENDANTS WAIVED ANY PUTATIVE FIRST AMENDMENT RIGHT TO PUBLISH HIS NAME BY PROMISING NOT TO IDENTIFY MR. COHEN.

By knowingly and voluntarily promising Mr. Cohen that they would not disclose his identity in return for the documents he supplied, the newspapers waived the claim of a First Amendment right to publish his name in disregard of their promises. The opinion below failed to address at all the Minnesota Court of Appeals' analysis and holding (A-35-37) of defendants' waiver of any First Amendment rights through their reporters' promises.

Constitutional rights are subject to waiver through agreements. *D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S.

174, 185-87 (1972). A recent Court of Appeals decision, *Erie Telecommunications, Inc. v. City of Erie, Pennsylvania*, 853 F.2d 1084, 1096-97 (3d Cir. 1988), held that parties may waive First Amendment rights in particular. *Erie* rebuked a party's attempt to withdraw from its obligations after having the benefit of full performance by the other party.

The opinion below found that the exchange of promises of confidentiality for information is a common, well-established journalistic practice. A-5. The Minnesota Court of Appeals pointed out that the reporters who promised confidentiality to Mr. Cohen were seasoned journalists who had themselves given such pledges on a regular basis for many years before their promises in this case. Journalists never know exactly what information they will receive when they make these promises. Nevertheless, defendants' reporters must have anticipated that the plaintiff was to give them damaging information about a Democratic candidate; they knew that Mr. Cohen was working for the Whitney campaign, and he told them that the information might relate to a political candidate. The reporters knew of Mr. Cohen's prominence as an active Republican and thus knew that publication of his name could be of interest to the public. They understood, then, that they were waiving the right to publish a potentially newsworthy item in return for obtaining another potentially newsworthy item. A-36, A-37-38.

That court concluded that the waiver should be enforced as part of a negotiated agreement between private parties of equal bargaining power, experienced reporters on the one hand and an experienced political operative on the other. A-37.

Failure to recognize a waiver in these circumstances

would allow the press to extract full performance from other parties to its transactions while leaving it free to unilaterally repudiate its own commitments. Promises by newspapers would become meaningless if they are given the right to use the First Amendment to escape the consequences of violating even unambiguous and undisputed promises.

III.

THE FIRST AMENDMENT DOES NOT GIVE THE PRESS THE RIGHT TO VIOLATE THE RIGHTS OF OTHERS THROUGH INTENTIONAL MISCONDUCT.

A. Newspapers are not immune from laws of general applicability.

Dissenting Minnesota Supreme Court Justice Lawrence Yetka wrote that the opinion below "offends the fundamental principle of equality under the law" by exempting newspapers from rules by which ordinary people are bound. A-15.Dissenting Justice Glenn Kelley agreed and reproached "the perfidy of these defendants, the liability for which they now seek to escape by trying to crawl under the aegis of the First Amendment, which, in my opinion, has nothing to do with the case." A-18. He said that any other person under similar circumstances "would most certainly have been liable in damages for breach of contract." A-17.

This Court already has indicated that wrongdoers cannot employ the First Amendment to thwart a remedy for acts which would be unlawful when committed by others. *Branzburg v. Hayes,* 408 U.S. 665, 682-83 (1972), held that the First Amendment does not invalidate the enforcement against the press of laws of general applicability despite the possible burden that may be imposed.

This holding was reiterated in *University of Pennsylvania v. Equal Employment Opportunity Commission,* 110 S.Ct. 577, 588 (1990). The Court held in *Branzburg* that a publisher "has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." The press "is not free to publish with impunity everything and anything it desires to publish." There it was claimed that requiring identification of sources promised confidentiality would impose an unconstitutional burden on news gathering. *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 150 (1967), contained similar language and emphasized that constitutional protection for the dissemination of information "does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others."

Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 581-83 (1983), also stressed that states can subject newspapers to generally applicable regulations without creating constitutional problems. Generally applicable taxes, for example, impose no constitutionally significant burden on First Amendment rights, and the First Amendment does not require a state to grant exemptions from them. *Jimmy Swaggart Ministries v. Board of Equalization,* 110 S.Ct. 688, 697 (1990).

A decision last year rejected another claim that the First Amendment frees certain groups from laws restricting the conduct of everyone else. *Employment Div., Dept. of Human Services v. Smith,* 110 S.Ct. 1595, 1604 (1990), held that generally applicable state laws that have the effect of burdening a particular religious practice are enforceable without the need of showing a compelling governmental

interest. Allowing exceptions to rules governing the rest of society would produce "a private right to ignore generally applicable laws." Far from being required by the First Amendment, the Court declared that such a practice would be "a constitutional anomaly." The Court applied this decision in *Minnesota v. Hershberger*, 110 S.Ct. 1918 (1990).

B. The First Amendment does not give newspapers a right to gather news through intentional wrongdoing.

Unlike the Minnesota Court of Appeals (A-30-31), the Minnesota Supreme Court regarded the enforcement of its promises as an "impermissible restriction" upon the press under *New York Times v. Sullivan*, 376 U.S. 254 (1964). A-12 n.6. *New York Times* itself made no mention of erecting constitutional barriers to those seeking redress for violations of promises by newspapers. Instead of merely following precedent, the opinion below goes far beyond *New York Times* by validating a wrongful means of gathering news through the deliberate dishonoring of promises.

New York Times gave protection to journalists from liability for inadvertent errors committed in the course of doing their jobs honestly. It did not free them from the consequences of knowing and deliberate misconduct like the calculated violation of a clearcut promise. This Court has not condoned intentional or reckless wrongdoing by the press even for defamation of public officials.

Instead, the Court has condemned the use of lies by the press as not deserving of constitutional protection.

> But the constitutional guarantees can tolerate sanctions against *calculated* falsehood without significant impairment of their essential function .... "For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Time, Inc. v. Hill*, 385 U.S. 374, 389-90 (1967) (emphasis in original).

Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678, 2696 n.34 (1989), agreed and added, "Of course, the protection of 'calculated falsehoods' does not promote self-determination."

The aforementioned cases denounced calculated falsehoods in the form of knowing and deliberate defamation. The infliction of injury by the knowing and deliberate violation of clear-cut and undisputed promises deserves equal censure and is unworthy of constitutional protection. The First Amendment should not be construed to authorize lies in any form.

On the specific subject matter of this case, the First Amendment does not confer a license to break promises given in return for information relating to political campaigns. A promise made to obtain information on office seekers should be judged by the same rules as any other promise. The Court emphasized in *Harte-Hanks*, 109 S.Ct. at 2696, that it has not accorded the press absolute immunity in its coverage of elections.

C. Newspapers do not have an unlimited right to publish truthful information.

From the inception of this case, defendants have argued that they should not be liable to Mr. Cohen for the consequences of breaking their promises, because their articles identifying him contained truthful information. Brief of Northwest Publications, Inc. in opposition to petition for certiorari at 12 n.3. Defendants' publication of truthful information was selective, however; the articles identifying Mr. Cohen did not disclose that the newspapers had made and had broken promises to him. A-6, A-25. That notwithstanding, the publication of truthful information does not automatically afford immunity from liability.

The Florida Star v. B.J.F., 109 S.Ct. 2603, 2608-9, 2610 n.8, 2613 (1989), protected the publication only of lawfully obtained truthful information and refused the invitation to hold that the publication of unlawfully acquired truthful information may not be punished. Likewise, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103, 104, 105-6 (1979), noted repeatedly that First Amendment protection only applied to the publication of information which was lawfully obtained. As the Minnesota Court of Appeals indicated (A-35), information obtained through violated promises of confidentiality is not lawfully obtained.

In other cases discussed above, this Court has refused to recognize a right to publish truthful information in violation of an agreement or other condition which was accepted to obtain the information. *Snepp v. United States*, 444 U.S. 507 (1980); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

In another context, *James v. Illinois*, 110 S.Ct. 648, 651 (1990), held that certain truthful, but illegally obtained,

evidence must be excluded from criminal trials to protect people from disregard of their rights during investigations. Various rules limit the means by which government may conduct the "search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation's history." Newspapers should not be granted greater rights than judges, juries, and law enforcement officials to obtain information by violating the rights of others.

IV.

NO FIRST AMENDMENT INTERESTS ARE SERVED BY PROTECTING THE PRESS FROM THE CONSEQUENCES OF DISHONORED PROMISES OF CONFIDENTIALITY.

In upholding the jury's verdict for Mr. Cohen, Judge Knoll held that to deny an injured person recovery for demonstrated harm caused by the breach of an otherwise valid contract would deprive him of the protection of the law without any countervailing benefit to the legitimate interest of the public in being informed. A-69.

The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The opinion below recognized that the media depend upon confidential sources for much of the news supplied to the public. A-8.

Justice Kelley said that the opinion below "serves to inhibit rather than to promote the objectives of the First Amendment by 'drying up' potential sources of information on public matters." He pointed out that defendants in this case are claiming that the public's "right to know" justifies the violation of promises of confidentiality but

ironically argued for the same right-to-know to promote enactment of the Minnesota Free Flow of Information Act to protect these promises. A-18.

Confidential sources are relied upon most heavily in reporting about the subject of government. *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1299 (D. Minn. 1990). Justice Yetka warned that allowing newspapers to break promises for facts about political candidates will discourage other sources from providing material and thus reduce the amount of information made available to the public about the qualifications of candidates. A-15.

The opinion below granted that "if it is known that promises will not be kept, sources may dry up." A-8.

In protesting against orders by judges to expose sources and in seeking adoption of shield laws, defendants and others have argued that the disclosure of the names of sources promised confidentiality would curtail the flow of news to the public.[1] Confidential sources would even be more likely to disappear if this Court gives the press the right to unilaterally break its promises. Indeed, Mr. Salisbury admitted that after his name appeared as the writer of the Pioneer Press article identifying Mr. Cohen, some of his sources have been reluctant to give him further

[1]In addition to the testimony and authorities cited above, see *Matter of Farber*, 394 A.2d 330, 331, 333 (N.J. 1978). In that case, the Star Tribune filed an amicus brief supporting the position that court-ordered disclosure of confidential sources would seriously impair newsgathering and the dissemination of news, "because much information would never be forthcoming to the news media unless the persons who were the sources of such information could be entirely certain that their identities would remain secret." The result would be "a substantial lessening in the supply of available news on a variety of important and sensitive issues, all to the detriment of the public interest."

information for fear that his newspaper would break promises to them. R. 424.

The opinion below, and not the award of damages to Mr. Cohen for injuries which all courts below found he has suffered, would chill the flow of information to the public. The Minnesota Court of Appeals held (A-35):

> Were we not to enforce the newspapers' promises of confidentiality, confidential sources would have no legal recourse against unscrupulous reporters or editors. Ultimately, news sources could dry up, resulting in less newsworthy information to publish. Our decision enhances the legislatively expressed interest in protecting confidential news sources in order to promote the free flow of information to the media and, ultimately, to the public. *See* Minn. Stat. § 595.022.

Justice Yetka called it "unconscionable to allow the press on the one hand to hide behind the shield of confidentiality when it does not want to reveal the source of its information; yet, on the other hand, to violate confidentiality agreements with impunity when it decides that disclosing the source will help make its story more sensational and profitable." A-15.

Defendants had several valid options under their agreement with Mr. Cohen. They could have run a story similar to that of the Associated Press which did not reveal the name of the source. Or, like WCCO-TV, they could have declined to run any story at all. Alternatively, as the Court of Appeals pointed out, any interest the newspapers had in informing the public of the motivations of the source would have been satisfied by describing the source by type such as Republican activist without identifying him by name. A-34.

This case has implications beyond the violation of promises. If the press is not liable for dishonoring voluntary promises to obtain information, is it also entitled to commit torts or crimes in gathering news? The most widely used university textbook on the subject of investigative reporting, D. ANDERSON & P. BENJAMINSON, INVESTIGATIVE REPORTING (1976), R. 1568, acknowledges that this concern is not merely hypothetical. Chapter 2 (at 6) entitled "Ethics of Investigative Reporting" begins with the sentence, "Many fundamental techniques of investigative reporting involve actions some would label dishonest, fraudulent, immoral, and perhaps even illegal." R. 1810.

Two U.S. Court of Appeals decisions, rejecting claims that the First Amendment vests the press with immunity from liability for torts committed while gathering news, are also relevant to media claims that they should be free to break voluntary promises. In upholding limitations on a photographer's access to Mrs. Jacqueline Kennedy Onassis, *Galella v. Onassis*, 487 F.2d 986, 996 (2d Cir. 1973), declared, "There is no threat to a free press in requiring its agents to act within the law."

Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971), ruled that "there is no First Amendment interest in protecting news media from calculated misdeeds." Nor should the press be immunized from liability by the publication of facts wrongfully acquired. To do so "would encourage conduct by news media that grossly offends ordinary men."

The opinion below does not serve the purposes of the First Amendment. Instead, said Justice Yetka, "The decision of this court makes this a sad day in the history of a

responsible press in America." No one, including the news media, should be above the law. A-16.

CONCLUSION

For the reasons stated in this brief and in the petition for certiorari, petitioner Dan Cohen respectfully requests that the judgment of the Minnesota Supreme Court be reversed and the judgment of the Minnesota Court of Appeals be affirmed together with interest in accordance with the law of Minnesota.

Respectfully submitted,

ELLIOT C. ROTHENBERG
Counsel for Petitioner
3901 West 25th Street
Minneapolis, MN 55416
(612) 926-8185

Dated: January 22, 1991

IN THE

Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

v.

COWLES MEDIA COMPANY, a corporation d/b/a Minneapolis Star and Tribune Company and NORTHWEST PUBLICATIONS, INC., a corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENT COWLES MEDIA COMPANY

JOHN D. FRENCH
JAMES FITZMAURICE
JOHN BORGER*
Faegre & Benson
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 336-3000
Attorneys for Respondent Cowles Media Company
*Counsel of Record

Of Counsel:
RANDY M. LEBEDOFF
425 Portland Avenue South
Minneapolis, MN 55488
(612) 672-4000

[illegible] Printing Co., [illegible] St., St. Paul, Minn. [illegible] — [illegible]

QUESTIONS PRESENTED

Petitioner, in formulating the Question Presented, fails to acknowledge that the Minnesota Supreme Court found, as a matter of Minnesota state law, that agreements between reporters and sources are not legally binding contracts. He also overstates the role of the First Amendment in that court's discussion of promissory estoppel, which—though it is the sole basis for review by this Court—was never asserted by petitioner in any of the lower courts.

Accordingly, the Questions Presented are:

1. Whether this Court is properly presented with a federal question for review by the Minnesota Supreme Court's discussion of promissory estoppel and the First Amendment, when the state-law doctrine of promissory estoppel was not properly presented to the lower court and was not necessary to its judgment.

2. If so, whether the Minnesota Supreme Court properly gave weight to First Amendment considerations where petitioner sought to hold the newspapers liable for publishing true facts about matters of public significance in the context of an election campaign.

LIST OF PARTIES

The parties to the proceeding below were the petitioner Dan Cohen, respondent Cowles Media Company, publisher of the *Minneapolis Star and Tribune* (hereinafter "Star Tribune"), and respondent Northwest Publications, Inc.

Cowles Media Company has no parent company and has no subsidiaries other than wholly owned subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1990

No. 90-634

DAN COHEN,

Petitioner,

v.

COWLES MEDIA COMPANY, a corporation d/b/a Minneapolis Star and Tribune Company and NORTHWEST PUBLICATIONS, INC., a corporation,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MINNESOTA

BRIEF OF RESPONDENT COWLES MEDIA COMPANY

STATEMENT OF THE CASE

A. Introduction.

Petitioner Dan Cohen brought this action against two newspapers to recover compensatory and punitive damages for breach of contract and fraudulent misrepresentation based upon their public disclosure of petitioner as the source of information concerning old misdemeanor convictions of a candidate for lieutenant governor. Cohen, working as a public relations representative for one gubernatorial campaign, hoped that disclosing this information would damage the opposition's chances in the election. The newspapers accurately identified Cohen as the source of this information because they considered his activities to be at least as newsworthy as the information about the candidate. Cohen had obtained a promise of confidentiality from the newspapers' reporters before he gave them the information.

A jury awarded Cohen a total of $700,000 on his two theories of breach of contract and of misrepresentation. Both appellate courts overturned the misrepresentation verdict and $500,000 punitive damages award because the facts of the case did not support a fraud claim under Minnesota law (A-6-7; A-39-42). The Minnesota Supreme Court overturned the contract award, again under Minnesota state law, on the ground that the law "does not create a contract where the parties intended none" (A-9), thereby setting aside the jury's award of $200,000 compensatory damages.

This Court granted certiorari, limited to petitioner's first question concerning the role of the First Amendment in this case. The Minnesota Supreme Court mentioned the First Amendment only in its discussion of a possible theory of promissory estoppel—a theory which was not presented at

trial, which was not briefed on appeal, and which "surfaced" (A-11 n.5) only obliquely at the end of oral argument in the Minnesota Supreme Court. The Minnesota Supreme Court expressly did not "consider First Amendment implications" in its resolution of Cohen's claim for breach of contract (A-13).

B. Factual Background.

Six days before the 1982 gubernatorial election between Republican Wheelock Whitney and Democrat Rudy Perpich, five Whitney supporters met in the campaign's headquarters in Minneapolis to consider a tactic for bolstering the badly trailing Whitney campaign. All five men had extensive experience in political campaigns and three had been elected to public office (R. 140-41). One of these men (a former legislator and former county attorney) had obtained criminal records showing that Marlene Johnson, the Democratic candidate for lieutenant governor, had been convicted twelve years earlier on two minor criminal counts of shoplifting and unlawful assembly.[1] It was decided that another of these men, petitioner Dan Cohen (a former city council president), would deliver these documents to reporters for the Minneapolis and St. Paul newspapers, the Associated Press, and WCCO-TV (R. 148-49).

At the Capitol press room, Cohen approached *Minneapolis Tribune* reporter Lori Sturdevant and said: "I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous

[1] Dissenting Minnesota Supreme Court Justice Yetka, although strongly critical of the newspapers for breaking their promises to Cohen, characterized the information which Cohen provided about Johnson as "rather trivial infractions" (A-15).

source, that my name will not appear in any material in connection with this, and you will also agree that you're not going to pursue with me a question of who my source is, then I'll furnish you with the documents" (R. 155). Sturdevant agreed (R. 156), and Cohen gave her the documents and talked with her about their contents (R. 157). Cohen crossed the hall to the office of *St. Paul Dispatch* reporter Bill Salisbury, where a similar exchange occurred (R. 163-69). By the time Cohen approached AP reporter Gary Nelson, it was obvious that he was providing information to a number of different reporters (R. 398). Again, Cohen provided documents after Nelson agreed to treat him as an anonymous source (R. 172-73). After some work in his own office, Cohen met for lunch with WCCO-TV reporter Dave Nimmer, and "rather quickly" went through the same routine with him (R. 176-77).

The four news organizations treated the story differently. The Associated Press described the contents of court records concerning Marlene Johnson which "were slipped to reporters Wednesday," but did not identify Cohen (JA-11). Nimmer recommended that WCCO-TV "throw the story away. It was no story" (R. 491), because "I didn't believe it was fair to the campaign. I thought it was silly" (R. 504). The Minneapolis and St. Paul papers published both parts of the story: the contents of the court records concerning Marlene Johnson, and Dan Cohen's role in disseminating that information (JA-1-10).

Before publishing the story, the Star Tribune investigated it at length. Assistant City Editor Roger Buoen learned of the records from Sturdevant and sent another reporter to St. Paul to locate the original records (R. 341). Reporter David Anderson went to the dead storage area of the record center and examined not only the records themselves, but also the

sign-out sheet, which showed that the last person to see the records before Anderson was Whitney supporter Gary Flakne; Flakne had checked the records the day before, and the last person before that had been years earlier (R. 1572-74). Anderson called Flakne, who revealed the very information that Cohen was attempting to keep secret: Flakne told Anderson that "I did it for Dan Cohen" (R. 1607; *see also* R. 324-26; *but see* R. 1595-97). Whitney's campaign manager, who had learned of Cohen's role from one of Cohen's colleagues (R. 737, 739), also identified Cohen as the source of the Johnson information (JA-2). Reporters got reactions from both the Democratic and Republican campaigns. In all, four or five reporters contributed to the story (R. 1636).

The subject of the still-unwritten story came before about 15 editors (R. 1471) at the Star Tribune news huddle beginning about 3:30 or 4:00 p.m.; the story was "a subject of vigorous debate at the huddle," which lasted past 5:00 p.m. (R. 1306-08). Some editors took the position that the Johnson information was not newsworthy at all; others took the position that the fact that a Whitney ally had leaked the information was at least as important as the information itself and the two items should be treated equally; some took the position that the promise of confidentiality had to be protected at all costs; some said a connection should be made to the Whitney campaign without identifying the individual. Managing editor Frank Wright presided over the huddle and listened to the debate, but stated no position of his own except that Star Tribune should thoroughly investigate the story itself (R. 1308, 1313-14, 1469-72). The huddle ended with the matter still unresolved (R. 1307-08, 1469-72). Sturdevant called Cohen to ask whether he would withdraw his request for confidentiality; he refused (R. 455-57, 1144-45).

About 9:00 or 9:30 that evening, assistant managing editor Mike Finney, with the approval of managing editor Frank Wright, made the final decision to publish the story using Cohen's name (R. 450-51, 1142-43, 1148, 1473). This was only an hour or so before the paper had to go to press (R. 1302). The editors considered and then rejected a variety of options. The option of not running the story at all was rejected because the information about Johnson was newsworthy (R. 1309, 1311). Moreover, the editors were aware that several other news organizations had the story, and if the other media published the information and the Star Tribune did not, then the Star Tribune would be accused of covering up for the Perpich campaign (R. 1310-11, 1475-76).

The editors also rejected the option of running a story about Johnson's records without disclosing the source of the records. The source of the information was considered to be at least as newsworthy as the information about Ms. Johnson R. 1639, 1309-10). In the Associated Press story, Ms. Johnson accused the Whitney campaign of "a last-minute smear" and the Whitney campaign denied any involvement, which left the reader hanging (R. 1312-13). A veiled reference to "a Whitney ally" or a "Whitney supporter" was similarly an unsatisfactory alternative because it would have left many people open to possible suspicion and would have left the readers unsure of the source's real relationship to the campaign; the best way to deal with the situation was to be specific (R. 1150-52, 1488; *see also* R. 1405-06). Furthermore, Cohen's role in distributing the records was becoming more and more widely known, and Star Tribune reporters were able to obtain that information from other sources who had made no promise of confidentiality (R. 1639-41). In Finney's judgment, this spreading knowledge "really voided the commitment that we had made earlier to Mr. Cohen" (R. 1640).

Sturdevant disagreed with the decision and asked that her name be taken off the story, which was done (R. 452). Over the following years, thoughtful editors and reporters around the country have reached a variety of conclusions about whether Cohen should have been identified (R. 499).

Cohen's employment with Martin-Williams, Inc., an advertising agency, ended the day the articles appeared. Trial testimony conflicted as to whether Cohen resigned (R. 1504; testimony of Cohen's supervisor, David Floren) or was fired (R. 201; testimony of Cohen).

C. Procedural Background.

Cohen commenced this action against the Minneapolis and St. Paul newspapers in December 1982, alleging breach of contract and misrepresentation. Following discovery, the newspapers moved for summary judgment, arguing among other grounds that the First Amendment protected their editorial decisions. The trial court denied that motion on June 19, 1987 (A-77).

Trial began July 5, 1988. The trial court refused to allow defendant's attorneys to argue that the newspapers' publications were protected by the First Amendment, yet it allowed plaintiff's counsel to tell the jury that the court had rejected the newspapers' First Amendment defenses (R. 1784). On July 22, 1988, the jury returned a verdict against the newspapers for breach of contract and fraudulent misrepresentation. The jury awarded plaintiff $200,000 compensatory damages as well as $250,000 in punitive damages against each defendant (A-70). The trial court denied defendants' various post-trial motions on November 18, 1988 (A-61).

On appeal, the Minnesota Court of Appeals unanimously set aside the award of punitive damages, after examining the evidence and finding as a matter of law that there "was no

evidence of material misrepresentations or omissions" to support the jury verdict of fraudulent misrepresentation (A-41). In that September 5, 1989 decision, a two-to-one majority of the Court of Appeals affirmed the $200,000 compensatory award for breach of contract (A-19). In dissent, Judge Crippen criticized the majority's decision as "out of sync with settled first amendment principles. No authority, direct or by remote analogy, permits an award of damages for publishing political material, and justifies this as an application of state common law not even slightly limited in deference to the first amendment" (A-46).

All parties appealed to the Minnesota Supreme Court. On July 20, 1990, that court unanimously affirmed the reversal of the misrepresentation verdict and punitive damages award (A-6-7, 14, 17) and, by a four-to-two majority, reversed the award of compensatory damages for breach of contract. The majority concluded that a contract cause of action was inappropriate in the journalist-source relationship, because reporters and their sources do not ordinarily believe they are making legally binding contracts and because a contract cause of action would be too rigid to permit proper consideration of all of the special circumstances in this situation (A-7-10).

Cohen's petition for certiorari invoked the First Amendment and the Contract Clause. On December 10, 1990, this Court granted certiorari on the First Amendment issue only.

SUMMARY OF ARGUMENT

Noticeably absent from Petitioner's Brief is any statement of his theory of recovery after the Minnesota Supreme Court's disposition of his contract claim on state-law grounds. In asking that "the judgment of the Minnesota Court of Appeals be affirmed," Petitioner's Brief at 31, petitioner asks for a legal impossibility; that judgment upheld only petitioner's claim

for breach of contract, which is not before this Court. Petitioner's Brief thus proceeds from a fundamentally defective view of the federal issue actually before this Court.

I. This petition presents an awkward and inappropriate vehicle for this Court to address the First Amendment issues asserted by petitioner. Petitioner lost his jury award on purely state-law grounds, when the Minnesota Supreme Court reversed the judgments of breach of contract and misrepresentation. The Minnesota Supreme Court discussed the First Amendment only in the context of a theory of promissory estoppel which petitioner himself had never raised. Its discussion of promissory estoppel did not affect the judgment of the Minnesota Supreme Court in any way. Consequently, the references to the First Amendment in the decision below are dicta, and provide dubious grounds for this Court's jurisdiction in this case. Furthermore, to allow petitioner to proceed anew on a promissory estoppel claim which he never asserted, either at trial or on appeal, would violate long-established rules of appellate practice and procedure and would deny respondents due process of law.

II. Judicial scrutiny of relationships between journalists and their sources requires some measure of First Amendment sensitivity. The present case directly affects respondents' First Amendment rights to gather the news, to exercise editorial discretion in deciding what news to publish or not publish, and to communicate truthful information about the conduct of political campaigns. In this context, the Minnesota Supreme Court's approach of using promissory estoppel on a case-by-case basis to balance the journalists' First Amendment rights against the source's interest in confidentiality/anonymity is the minimum consideration which the Constitution provides to respondents. The state court struck this particular balance against petitioner and his state-protected in-

terests. This Court has no reason to adjust that balance, because that would not change the result below.

Furthermore, in the particular factual circumstances of this case, this Court's prior decisions provide a broader First Amendment analysis for affirming the conclusion of the Minnesota Supreme Court. Because the respondent newspapers published truthful information about a matter of public significance, they cannot be punished for that publication unless there is, at the very least, "a need to further a state interest of the highest order." *The Florida Star v. B.J.F.*, 491 U.S. 524, ——, 58 U.S.L.W. 4816, 4818 (1990). Petitioner's asserted interest in anonymity does not rise to that level.

ARGUMENT

Point I

THIS COURT SHOULD DISMISS THE WRIT OF CERTIORARI FOR WANT OF JURISDICTION.

Petitioner Cohen tried his case and obtained a jury verdict on his two theories of misrepresentation and breach of contract (A-72-77). The Minnesota Supreme Court reversed the misrepresentation finding and the punitive damages award because the record showed that, at the time Cohen was promised confidentiality, neither the reporters nor the editors intended to reveal his identity (A-6-7). The court reversed the contract award because, as a matter of Minnesota contract law, the court was "not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract" (A-9). Neither ruling involved any consideration of the First Amendment, as the court expressly stated (A-12-13). The reversal of petitioner's entire judgment thus rests entirely upon state grounds.

The Minnesota Supreme Court did invoke the First Amendment in its discussion in dicta of the possible application of a theory of promissory estoppel, in Part III of its decision (A-10-14). Cohen never advanced this theory at trial or on appeal. The Minnesota Supreme Court observed that this theory "surfaced during oral argument" (A-11 n.5), but even that was not at Cohen's urging and not in the form ultimately discussed in the majority opinion.[2]

The procedural context in which the Minnesota Supreme Court considered the public policy and First Amendment implications of the present situation makes it both unnecessary and inappropriate for this Court to address the federal issue. Although "it is irrelevant to inquire when a federal question was raised in a court below when it appears that such question was actually considered and decided," *Orr v. Orr*, 440 U.S. 268, 274-75 (1979), this Court has emphasized that it "reviews judgments, not statements in opinions," *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). The judgment of the Minnesota Supreme Court, reversing Cohen's recovery on contract and misrepresentation claims, rested on state grounds

---

[2] During rebuttal argument, Justice Yetka first questioned

> whether if there had been even a practice, a custom in the trade—that there could be an equitable estoppel of some kind to protect people who gave this information to a newspaper reporter with every indication that it was never going to be used, that the source would never be used. Now, that's a little different than an outright contract, but there are equitable estoppel cases, and *it hasn't even been discussed.*

(JA-38) (emphasis added). As developed in the majority opinion, however, promissory estoppel could arise not from general industry practice, but only from a particular unambiguous promise made by one particular individual to another (A-10-11).

entirely; the court's discussion of a possible theory of promissory estoppel was pure dicta that did not affect that judgment. The judgment reversing the jury verdicts, therefore, neither rests primarily on federal law nor is it interwoven with federal law; indeed, the judgment does not even refer to federal law. Accordingly, the judgment rests entirely upon adequate and independent state grounds, and this Court should dismiss the petition for want of federal jurisdiction. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983).

The Minnesota Supreme Court's discussion of promissory estoppel simply constitutes a framework for future litigation of any similar problems in Minnesota and a warning to the press that there "may be instances where a confidential source would be entitled to a remedy such as promissory estoppel, when [Minnesota's] interest in enforcing the promise to the source outweighs First Amendment considerations" (A-14). The opinion certainly does not "grant newspapers immunity from liability for damages caused by dishonoring promises of confidentiality given in exchange for information on a political candidate" (Petitioner's Brief at i). It is an intentionally and carefully limited conclusion, set in a discrete factual context (A-14).

In invoking First Amendment considerations, the Minnesota Supreme Court did not cite any particular decision of this Court. Instead, it spoke of the First Amendment as a sort of shorthand for the general public interest in receiving information about political campaigns—an interest just as much to be found in state law as in federal law. *E.g., Friedell v. Blakely Printing Co.*, 163 Minn. 226, 203 N.W. 974 (1925); *Marks v. Baker*, 28 Minn. 162, 9 N.W. 678 (1881); JA-32 (transcript of oral argument; questions by Wahl, J.).

To grant petitioner any measure of relief at this stage on a theory of promissory estoppel would violate longstanding principles of both this Court and the Minnesota Supreme Court. In Minnesota, as in most jurisdictions, "[a]s a general rule, litigants are bound on appeal by the theory or theories, however erroneous or imprudent, upon which the case was actually tried." *Johnson v. Jensen*, 446 N.W.2d 664, 665 (Minn. 1989). The Minnesota Supreme Court surely would not have departed from this rule to grant petitioner recovery on a promissory estoppel theory which he had not raised at trial.[3]

This Court likewise follows the rule that, after bringing and trying a case on one theory, the plaintiff on appeal cannot be permitted to change to another which the defendant was not required to meet below. *Virginian R.R. v. Mullens*, 271 U.S. 220, 227-28 (1926). Although this rule generally is stated as a matter of appellate practice and procedure, it carries constitutional overtones. Allowing petitioner to recover compensatory damages on a claim which he never advanced or proved in the lower courts, even though the Minnesota Supreme Court chose to discuss the theory of promissory estop-

[3] In numerous cases, Minnesota appellate courts have refused to consider various theories of estoppel, including promissory estoppel (even where plaintiff had asserted a breach of contract claim below), which a party attempted to raise for the first time on appeal. *E.g., Flooring Removal, Inc. v. Ryerson*, 447 N.W.2d 429, 430 (Minn. 1989) (further stating that "the court of appeals erred in identifying and then deciding this issue"); *W.H. Barber Co. v. McNamara-Vivant Contracting Co.*, 293 N.W.2d 351, 357 (Minn. 1979); *Haugland v. Canton*, 250 Minn. 245, 251-52, 84 N.W.2d 274, 279 (1957); *Annis v. Annis*, 250 Minn. 256, 263, 84 N.W.2d 256, 261 (1957); *Barnard-Curtiss Co. v. Minneapolis Dredging Co.*, 200 Minn. 327, 331, 274 N.W. 229, 232 (1937); *Park-Lake Car Wash, Inc. v. Springer*, 394 N.W.2d 505, 518 (Minn. Ct. App. 1986).

pel in a manner which did not affect the outcome of the appeal below, would deny respondents due process of law. *See West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U.S. 63, 77 (1935) ("To put into the case now an issue heretofore kept out of it and thereby reach another [result] would be a denial of a full and fair hearing by the tribunals of the state, a denial forbidden by the Constitution of the nation."); *Peck v. Heurich*, 167 U.S. 624, 629 (1897) ("A judgment cannot be affirmed upon a ground not taken at trial, unless it is made clear beyond doubt that this could not prejudice the rights of the [opposing party].").[4]

The Minnesota Supreme Court's discussion of promissory estoppel had no effect on the actual judgment below. This Court's consideration of the First Amendment implications of such a promissory estoppel remedy for confidential sources can be left for another day, when a plaintiff has actually presented and litigated a claim for such a remedy. Because the only question for which this Court granted certiorari is one not *properly* raised, litigated, or passed upon below, this Court now should dismiss the petition for want of jurisdiction, *McCullough v. Kammerer Corp.*, 323 U.S. 327 (1945), or as improvidently granted, *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972).

---

[4] Because of the manner in which the theory "surfaced" in this case, respondents had no opportunity to address certain defenses relevant only in the context of a promissory estoppel claim. For example, the reporters at most were agents for the respondent newspapers, and even their agency status was a question of fact for the jury under the theories presented to the trial court (A-81-85). Under Minnesota law, "[e]stoppel cannot be posted on the claimed actions of an agent." *Froelich v. Aspenal, Inc.*, 361 N.W.2d 37, 39 (Minn. Ct. App. 1985).

Point II

ANY STATE LAW REMEDY FOR INJURIES ARISING FROM THE PUBLICATION OF TRUTHFUL INFORMATION ABOUT MATTERS OF PUBLIC SIGNIFICANCE MUST TAKE FIRST AMENDMENT PRINCIPLES INTO ACCOUNT.

A. The First Amendment Affects Any Analysis of Legal Liability in the Present Circumstances.

In addressing the substantive issue presented by the writ, petitioner in effect requests this Court to regulate journalistic ethics in newsgathering without considering First Amendment principles. This Court should reject that request.

In seeking confidentiality from the reporters, Cohen sought to keep the Minnesota electorate ignorant of certain information which he believed could hurt the Whitney campaign while revealing information which could hurt the Perpich-Johnson campaign. Cohen's group carefully chose both the manner and conditions of transferring the information about candidate Johnson to the reporters, with the twin purposes of heightening the damage to the Perpich-Johnson campaign and minimizing the risks of backlash against the Whitney campaign. The court records could have been mailed or delivered anonymously to the news organizations; instead, Cohen's group decided that personal delivery would lend the information "more credibility" (R. 597-98, 725-28). Cohen voluntarily transmitted the information to several news organizations to increase the odds that someone would publish the information, (*see* R. 5980); this necessarily would increase the competitive pressures for others to publish the information. That effort, at least, succeeded; however loudly Cohen's attorney and wit-

nesses proclaimed at trial that the defendants should have honored their reporters' agreement on confidentiality by simply withholding the entire story, that option effectively had been foreclosed by the release of the Associated Press story. Star Tribune concluded that it could not ignore the story without being accused of a cover-up to protect the Perpich-Johnson campaign, which it had endorsed just a few days earlier (R. 1310-11, 1475-76).

Cohen's strategy failed, however, in its further objective to manipulate the thrust of the news coverage. Cohen wanted to keep his role in releasing the information confidential so that the focus of the story would be on Johnson's court record (R. 357), and to avoid public backlash against the Whitney campaign (R. 378). The editors decided that the public was entitled to both parts of the story, and identified Cohen as the source (R. 1234, 1309-10, 1314-16, 1382-84, 1473, 1636-39). Cohen's lawsuit amounts to a complaint that he was unable to attack Johnson while shielded by anonymity.

Petitioner managed to convince the trial court that the case had "no constitutional dimension" (A-88). This Court, however, must surely disagree. The proceedings in the trial court restricted press freedoms: by importing contract theory into the relationships between reporters and their sources, thereby placing artificial limits upon the newsgathering process which neither reporters nor sources ever anticipated; by allowing courts to interpret contracts and to second-guess editorial decisions of what and when to publish or to withhold information; and by allowing recovery of damages for the publication of accurate information about a political campaign. The First Amendment protects each of these press activities: news-

gathering, *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); editorial discretion, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974); and publication of truthful information, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979), particularly information about political campaigns and the process of self-government, where debate should be "uninhibited, robust and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Governmental interference with constitutional rights through court enforcement of common law rules constitutes state action, *New York Times Co. v. Sullivan*, 376 U.S. at 265, even in the context of enforcing private contracts, *Railway Employees' Dept. v. Hanson*, 351 U.S. 225, 232 n.4 (1956); *Barrows v. Jackson*, 346 U.S. 249, 253-54 (1953).

In this setting, the First Amendment necessarily plays *some* role. Petitioner's argument to the contrary rests upon two premises: that by promising confidentiality, the newspaper reporters waived any First Amendment protections, and that by breaking those promises the newspapers engaged in wrongful behavior which deprives them of any First Amendment rights. Both points are mistaken.

(1) Waiver is Not an Issue in This Case.

Waiver is not an issue under the promissory estoppel approach taken by the Minnesota Supreme Court. The doctrine of promissory estoppel requires courts to consider numerous factors in determining whether "injustice can be avoided only by enforcing the promise" (A-10). Some of those factors, such as the public's interest in receiving information about political campaigns, would not be susceptible to waiver by journalists.

Even if the press were knowingly and voluntarily to agree to forego its own rights, the voluntariness of that agreement would be only one factor in the Minnesota Supreme Court's equitable balancing, rather than the bright-line determinant used by the Minnesota Court of Appeals (A-13) ("In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated.").

Petitioner's Brief at 20-22 fails to recognize this point, and complains that the Minnesota Supreme Court failed to address the waiver issue. Because the waiver argument does not apply to the promissory estoppel theory which is the sole basis for review by this Court, it should not be necessary to address it at length here. Briefly, however, Star Tribune notes two responses to petitioner's waiver argument. First, Cohen neither raised nor offered evidence on this point at trial; he raised it for the first time at pages 43-46 of his brief to the Minnesota Court of Appeals. This issue therefore is not properly before this Court. *See* pp. 13-14 above. Second, the reporters' promises do not meet the standard for waiver of constitutional rights, namely, "an intentional relinquishment or abandonment of a known right or privilege" made "with full awareness of the legal consequences." *D.H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185-86, 187 (1972). The Minnesota Supreme Court recognized that reporters and sources do not ordinarily believe they are engaged in making a legally binding contract (A-9). In that context, it cannot seriously be argued that journalists knowingly abandoned their constitutional defenses

to unforeseen litigation arising from a nonexistent contract. *See also* A-55-58 (Minn. Ct. App.; Crippen, J., dissenting).

(2) Ethical Standards Do Not Establish Legal Remedies.

Petitioner's "bad conduct" argument likewise is insufficient to deny respondents any and all First Amendment protection. Petitioner contends that he should recover damages because, by publishing information about him, the newspapers broke their promises to him. The Appellate Division of the New York Supreme Court rejected a similar argument in *Virelli v. Goodson-Todman Enterprises, Ltd.*, 142 A.D.2d 479, 536 N.Y.S.2d 571 (N.Y. App. Div. 1989), *appeal after remand*, 159 A.D.2d 23, 558 N.Y.S.2d 314 (1990), stating: "We see no reason why these [constitutional] principles should not apply equally where, as here, the only aspect of plaintiffs' claim distinguishing it from defamation and invasion of privacy is the alleged breach of [the reporter's] promise to self-censor the content of the article so that plaintiffs' identities would remain confidential." 142 A.D.2d at 487, 536 N.Y.S.2d at 576. This Court observed in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), that:

> in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. . . . Thus while . . . a bad motive may be deemed controlling for purposes of tort liability in other areas of the law, we think the First Amendment prohibits such a result in the area of public debate about public figures. (*Id.* at 53.)

In a parallel argument, petitioner implies that he should recover damages because some other journalists criticized re-

spondents for their decision to disclose his name. Petition at 6-7. Petitioner improperly confuses ethics with legal liability. The Minnesota Supreme Court made no such error:

> The question before us . . . is not whether keeping a confidential promise is ethically required but whether it is legally enforceable; whether, in other words, the law should superimpose a legal obligation on a moral and ethical obligation. The two obligations are not always coextensive. (A-8.)

The Associated Press made a different editorial choice than did respondents in the very same factual situation, yet in its amicus curiae brief urged the court below not to subject good faith exercises of editorial discretion to judicial scrutiny.

Decisions about newsgathering techniques and editorial content should remain primarily with journalists themselves. Journalists constantly must make decisions, under severe time constraints, about what information should be published and about how to obtain and to present the information. Their paramount objective is to inform the public. A pledge of confidentiality to a source should be neither sought nor granted lightly, for it can deprive the news-consuming public of significant, truthful information. Yet the discriminating use of confidential sources is an important and necessary tool for the press to acquire other significant, truthful information. The use of confidential sources requires journalists to make these trade-offs in what they perceive to be the interests of their readers, and not every journalist will agree with every choice. Courts should continue to avoid this professional debate. Judicial intervention in matters of professional standards would be counter-productive as well as unwarranted, because transforming ethical standards into legal rules would

create a disincentive for the press to set lofty standards for itself.

Star Tribune's editors did not lightly decide to identify Cohen as the source of the Marlene Johnson information in spite of reporter Sturdevant's promise. They considered several alternatives, and chose the course which they believed best served their readers. Their decision can be and has been debated, second-guessed, and criticized. In the final analysis, however, as respondents' expert witness David Lawrence, Jr., publisher and chairman of the Detroit Free Press, testified: "My personal definition of good journalism suggests that the stories that ran were reasonable and with honor" (R. 1399).

Courts should not accept legal theories which raise the interests of the source to the extent that they substantially interfere with the exercise of the newspapers' best judgments on how to inform their readers. As Judge Crippen wrote in dissent in the Minnesota Court of Appeals:

> When the state determines through civil lawsuits what constitutes a contract, when a breach occurs, and which special circumstances permit disregard of the promise, it usurps editorial decision-making and chills exercise of press freedom. In addition, this regulation inevitably shapes the decision about when the promise is appropriately used. It is for editors, not the courts, to decide when promises on content should be made and to decide when publication is important. (A-48-49.)

Journalists' own sense of honor and of professionalism provides more protection to sources than would any judicial remedy. The press has a long tradition of protecting confidential sources. Marcus, *The Reporter's Privilege: An Analysis of the Common Law*, Branzburg v. Hayes, *and Recent*

Statutory Developments, 25 Ariz. L. Rev. 815, 817 (1983) (tracing issue to John Peter Zenger in 1734). Indeed, journalists' own sense of professional responsibility has been demonstrably more effective in protecting their confidential sources than court-imposed fines and even jail sentences have been in forcing journalists to reveal their sources. *See, e.g.*, R. 698; *In re Grand Jury Proceedings Storer Communications v. Giovan*, 810 F.2d 580, 583 (6th Cir. 1987); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1976), *cert. denied*, 427 U.S. 912 (1975); *In re Farber*, 394 A.2d 330 (N.J. 1978), *cert. denied*, 439 U.S. 997 (1978). Furthermore, when reporters, editors and newspapers violate pledges of confidentiality, they will face criticism from fellow professionals and skepticism from potential sources, as this incident has shown (R. 424, 452). All of these factors make journalists unwilling to violate promises made to their sources, except in very rare instances.

Sometimes, however, journalists reluctantly will conclude that they must break a promise to a source in order to fulfill their obligation to their readers, as in Newsweek's decision to identify Oliver North as the source of leaks which North publicly had attributed to congressional sources (A-8 n.4). Because of the constitutional interest in allowing the widest possible discretion for journalistic judgments, this is an area best left to moral and ethical considerations, and to practical consequences, rather than to judicial determinations. Langley & Levine, *Broken Promises*, Columbia Journalism Review 21 at 24, July/August 1988; Note, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426, 1460-62 (1982).

This Court's prior decisions demonstrate its reluctance to limit First Amendment freedoms by transforming standards of ethics or fairness into tests of legal liability. In *Miami*

Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Court noted:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—*whether fair or unfair*—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. (*Id.* at 258; emphasis added.)

In short, "regardless of how beneficent-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976) (quoting Miami Herald, 418 U.S. at 259 (White, J., concurring)).[5]

---

[5] There are numerous similar pronouncements. In *Cox Broadcasting*, involving the publication of the name of a rape victim, the Court stressed: "In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast." 420 U.S. at 496. In *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), the Court observed: "The government cannot restrain communications of whatever information the media acquires—and which they *elect* to reveal." *Id.* at 10 (emphasis added). In *The Florida Star v. B.J.F.*, 491 U.S. 524, 57 U.S.L.W. 4816 (1989), the fact that a newspaper published a rape victim's full name in violation of its own internal policy of not publishing the names of sexual offense victims, *id.* at ——, 58 U.S.L.W. at 4817, had no bearing on this Court's analysis of the constitutional issues. In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, ——, 57 U.S.L.W. 4846, 4849 (1989), the Court emphasized its rejection of a "professional standards rule [in public figure defamation cases], which never commanded a majority of this Court."

B. This Court Has No Reason to Readjust The Minnesota Supreme Court's Balancing of the Interests Involved in This Case.

Recognizing any role whatsoever for the First Amendment in this case is enough to affirm the conclusion of the Minnesota Supreme Court. The Minnesota Supreme Court's analysis under promissory estoppel considers all of the reasons why the promise was not kept (A-11) and amounts to a case-by-case balancing of all of the interests involved: "The court must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity" (A-13). The Minnesota Supreme Court clearly disapproved of the contract theory advanced by petitioner and accepted by the lower courts because that theory "put[] an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship" (A-10).

In this case, the court placed considerable importance on the public policies (embodied in the First Amendment as well as in state law) which favor the free flow of information about election campaigns (A-13). The court gave comparatively little weight, in these particular circumstances, to petitioner's interest in obtaining anonymity in order to maintain deniability (A-11). No substantive reason exists for this Court to adjust the particular balance struck by the Minnesota Supreme Court, because that would not change the result below. *Cf. International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 398 (1986) (court does not "review federal issues that can have no effect on the state court's judgment").

C. Petitioner Has Not Shown a Need to Further a State Interest of the Highest Order by Punishing These Truthful Publications of Matters of Public Significance.

Of course, even though the Minnesota Supreme Court struck a balance in favor of respondent newspapers below, Star Tribune recognizes that a case-by-case balancing approach has its weaknesses. Commentators have criticized such a balancing test as affording too little protection to the First Amendment interests involved in particular disputes, as being subject to manipulation to reach predetermined conclusions, and as producing unpredictable results and uncertain expectations. *E.g.*, L. Tribe, *American Constitutional Law* 791-94 (2d ed. 1988); T. Emerson, *The System of Freedom of Expression* 717-18 (1970); Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424 (1962). This Court refuses to strike a case-by-case balance in defamation cases. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974) ("Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.").

Even if this Court decides that there is a need for a broad rule of general application, however, it is not necessary to fashion a general rule to cover the enforceability of promises extended by the press in any and all circumstances. Rather, that rule can be guided by the circumstances of the present case, which arises from the disclosure of the identity of a confidential source who engaged in political campaign activities, and who suffered damages from the publication of truthful information about matters of public significance.[6]

---

[6] In some situations, the interest served by disclosing the source's identity may have nothing to do with journalistic judgment but clearly would be sufficient to justify voluntary disclosure by the journalists. *E.g.*, R. 743-44 (if confidential source revealed he had

Nor does such a general rule need to reject the applicability of promissory estoppel to these situations. The promissory estoppel approach of the Minnesota Supreme Court provides

---

put botulism in public drinking water supply); *id.* at 1225-26 (if a confidential source were about to commit murder). In others, the interests asserted by the source or the nature of the alleged agreement itself might require constitutionally impermissible levels of judicial intrusion upon the editorial process, such as the alleged contract in *Strick v. Superior Court*, 143 Cal. App. 3rd 916, 919 n.1, 925 n.5, 192 Cal. Rptr. 314, 315 n.1, 320 n.5 (1983) (alleging breach of oral contract to "portray [plaintiffs] in a favorable light to the readers" if plaintiffs would talk to reporter).

In other situations, a source might assert interests different from those asserted by petitioner in this case (see pp. 32-40 below). This may strengthen or weaken the claim for state protection of that interest. For example, a celebrity might seek to enforce an agreement to share royalties from an authorized or exclusive account of his or her activities. Confidentiality might protect human life for informants on organized crime or totalitarian foreign governments. Those circumstances present a stronger case for state protection of the underlying interests. On the other hand, some "promises" between journalists and sources may be made in jest, or border so much on the frivolous that they do not warrant judicial enforcement. *E.g.*, Allman, *Noriega's Dark Victory*, Vanity Fair, Feb. 1990 at 114, 117 ("The condition of this interview is that you mention [my pet Dalmation] Dudley in *Vanity Fair*.").

Some journalists contend that they ethically may breach a promise of confidentiality to a source (1) when the newsworthiness of the identity of the source is at least as important as the basic information conveyed in the story (R. 1314); (2) when disclosure is required to correct public misstatements made by the source (A-7 n.4); (3) when a court has ordered disclosure of the source (*id.*); (4) where the source has passed along false information in a smear campaign, Smyser, *There are Sources and Then There are "Sourcerers,"* 5 Soc. Resp.: Journalism L. Med. 13, 17-18 (1979); or (5) when the source has died, Langley & Levine, *Broken Promises*, Columbia Journalism Review 21, July/August 1988.

In still other situations, the fact and scope of the purported agreement may be disputed. Star Tribune's Brief to the Minnesota Court of Appeals describes several examples of such situations at pages 23-24. This, of course, does not exhaust the universe of possibilities.

a useful screening mechanism. No promise is binding under promissory estoppel unless "injustice can be avoided only by enforcing the promise" (A-10); actions based on frivolous promises could be dismissed quickly and easily. Also, because the doctrine of promissory estoppel requires an unambiguous promise (A-10-11), the Minnesota Supreme Court decision implicitly incorporates as a matter of state law the requirement which a federal judge, working under the constraints of the opinion of the Minnesota Court of Appeals, imposed as a matter of constitutional law. *Ruzicka v. Conde Nast Publications, Inc.*, 733 F.Supp. 1289, 1300 (D. Minn. 1990) ("at a minimum, the Constitution requires plaintiffs in contract actions to enforce a reporter-source agreement to prove specific, unambiguous terms and to provide clear and convincing proof that the agreement was breached"), *appeal pending* (argued February 11, 1991). Furthermore, the doctrine of promissory estoppel, noteworthy for its "flexibility" (A-10), can accommodate within its balancing whatever general rule and increased weight for some factors which this Court finds necessary under the First Amendment.

(1) These Publications Consist of Truthful Information about Matters of Public Significance.

There is no claim in this case that the publications at issue contain any false statement of fact. The publications consist entirely of truthful information.

Nor is there any real question that descriptions of activities in political campaigns are matters of public significance. The Minnesota Supreme Court characterized this as "the quintessential public debate in our democratic society" (A-13), echoing pronouncements of this Court. *E.g.*, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, ——, 57

U.S.L.W. 4846, 4854 ("Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and critical to our history of individual liberty."); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office").

Petitioner may argue that it was not newsworthy to publish his name or the name of his employer, or that publication of these details lacks "public significance." *Cf.* Petitioner's Brief at 29. This Court, however, repeatedly has made clear that determination of "a matter of public significance" does not depend upon such fine parsing of the published words, but rather whether "the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import," *The Florida Star v. B.J.F.*, 491 U.S. 524, ——, 57 U.S.L.W. 4816, 4819 (1989) (article identifying victim of robbery and rape; matter of public significance was "the commission, and investigation, of a violent crime which had been reported to authorities"). *Accord, Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (article identifying juvenile alleged to have committed murder); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (article identifying judges whose conduct was being investigated); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (article and photograph identifying juvenile alleged to have committed murder); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (article identifying victim of rape-murder).

Therefore, the publications at issue here consisted entirely of truthful information about matters of public significance.

(2) Petitioner's Interests in Confidentiality, in the Circumstances of this Case, Are Not "of the Highest Order."

This Court long has recognized that the First Amendment provides particularly strong protections, and perhaps even absolute protection, to truthful publications about matters of public significance. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), this Court stressed that

> where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth. . . . Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. (*Id.* at 72-73, 74.)

This Court's decisions "demonstrate that state action to punish the publication of truthful information seldom can satisfy conditional standards." *Smith v. Daily Mail Publishing Co.*, 442 U.S. 97, 102 (1979). At the very least, where a person "lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Butterworth v. Smith*, 494 U.S. ——, ——, 58 U.S.L.W. 4363, 4365 (1990); *The Florida Star v. B.J.F.*, 491 U.S. at ——, 57 U.S.L.W. at 4818; *Daily Mail*, 443 U.S. at 103. The constitutionally proscribed state punishments include civil damage awards such as those in this case and in *Florida Star*. This principle precludes any recovery by petitioner against the newspapers under the circumstances of this case.

Because this case clearly involves the publication of truthful information about a matter of public significance, the critical question is whether petitioner has shown that his recovery of

civil damages through Minnesota law of promissory estoppel is necessary to further a state interest of the highest order.[7]

[7] Petitioner mistakenly asserts that the *Florida Star* standard does not apply because "information obtained through violated promises of confidentiality is not lawfully obtained." Petitioner's Brief at 26. Judge Crippen, the only judge in the courts below who discussed this contention, squarely rejected it (A-59) (Minn. Ct. App.; Crippen, J., dissenting). Furthermore, in this case, as recognized by both the Minnesota Supreme Court (A-4) and the Minnesota Court of Appeals (A-24), other sources had independently identified Cohen as the person responsible for releasing the Johnson material.

It would be an extreme and unwarranted step to hold that breaking a promise to a source—which is not a legally binding contract under state law (A-7-10)—renders the acquisition of information "unlawful" for purposes of the *Florida Star* standard. Although this Court has not defined the conduct which will render information "not lawfully acquired," it seems to have had in mind circumstances amounting to outright theft. *Cf. Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) (reporters not immune from criminal conviction for "stealing documents or private wiretapping"); *Time v. Hill*, 385 U.S. 374, 384 n.9 (1967) (intimating no view as to "whether the Constitution limits state power to sanction publication of matter obtained by an intrusion into a protected area, for example, through the use of electronic listening devices"). Past cases indicate that journalists who obtain information by violating, or whose sources have violated, statutes or rules against communication of the information itself have not acted unlawfully. *E.g., The Florida Star v. B.J.F.*, 491 U.S. at——, 57 U.S.L.W. at 4819 (police department provided information in violation of public records statute); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 832 (1978) (information about judicial commission proceeding apparently obtained from participant(s) whose disclosure of confidential information was a misdemeanor).

Even if the truthful information in this case had not been "lawfully obtained," petitioner is mistaken in his implicit assumption that publication of such truthful information is totally without First Amendment protection. This Court's decisions do not go that far. *See The Florida Star v. B.J.F.*, 491 U.S. at —— n.8, 57 U.S.L.W. at 4819 n.8 (Court has "no occasion to address" the issue of "whether, in cases where information has been acquired *unlawfully* [emphasis by the Court] by a newspaper or by a source, government may *ever* [emphasis added] punish not only the unlawful acquisition, but the ensuing publication as well"); *cf. Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 17 (1986) (Stevens, J., dissenting) ("right to publish or otherwise communicate information lawfully *or unlawfully* acquired" is one which "may be overcome only by a governmental objective of the highest order attainable in no less intrusive way") (emphasis added).

The "highest order" interest necessary to meet the *Florida Star - Daily Mail* standard can be no less than the level of interest necessary to justify a prior restraint. *Daily Mail*, 442 U.S. at 101-02.

Few asserted interests meet this high standard. In *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980), this Court recognized the federal government's "compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service," and upheld a requirement that CIA agents submit accounts of their agency activities to the CIA for prepublication review. The Court did *not* hold that these interests justified total suppression of such accounts, however, and the Court has denied injunctive relief when the assertion of national security interests has not been accompanied by sufficient evidence of necessity to meet the burden of justifying a prior restraint. *New York Times Co. v. United States*, 403 U.S. 713 (1971). Even rights protected by other constitutional provisions, such as the Sixth Amendment's right to a fair trial, may be insufficiently compelling to justify particular restraints on truthful publications. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).

(a) The Minnesota Supreme Court Did Not Recognize a State Interest in Enforcing All Promises for Their Own Sake.

Petitioner initially argues that the courts should protect his interest in enforcing promises made to him. Petitioner's Brief at 17-20. He conveniently ignores the fact that the Minnesota Supreme Court placed no weight whatsoever on the enforcement of promises for their own sake. True, the Minnesota Court of Appeals, in analyzing petitioner's claim for breach of contract, had relied upon a state interest in enforcing contracts (A-31-35). However, the Minnesota Supreme Court eliminated the contract claim on other grounds. Its promissory estoppel analysis eschewed any reliance on any general and formalistic state interest in freedom of contract,[8] and

[8] Petitioner's Brief at 19 resurrects this interest in "protecting expectations based on promises." That interest, standing alone, does not justify restrictions on First Amendment rights. "Contract" and "expectations based on promises" are mere labels, entitled to no more deference from this Court than "tort law" in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), or "revenue raising" in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), or "preventing emotional harm" in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Indeed, that abstract interest in protecting expectations is subject to numerous exceptions on grounds less significant than the First Amendment rights at stake here. *See* A-9.

Moreover, petitioner's call for broad judicial enforcement of promises between journalists and their sources carries considerable constitutional cost. Such promises, usually oral, are often vague and subject to misunderstanding. Problems of proof could convert almost every dispute between journalist and source into factual issues for trial. The cost of litigation alone could chill the exercise of First Amendment rights. *See Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967). Additionally, a cause of action for breach of reporter-source agreements, unrestrained by any First Amendment considerations, could be subject to enormous abuse by government officials. Such officials often are confidential sources. *See* E. Abel, *Leaking: Who Does It? Who Benefits? At What Cost* (1987). Government officials should not be given such a broad license to enlist the courts to control press content and to dictate the scope of debate on public issues. *See New York Times Co. v. Sullivan*, 376 U.S. at 270-78.

instead directly balanced this particular source's interest in protecting anonymity against the rights of the press and public to communicate this particular information (A-13).

(b) Petitioner's Interest in Protecting His Reputation is not "of the Highest Order."

The Minnesota Supreme Court referred to a "common law interest in protecting a promise of anonymity" (A-13). However, it did not specify the source of this common law interest. It further acknowledged that "[a]nonymity gives the source deniability, but deniability, depending on the circumstances, may or may not deserve legal protection" (A-11). To the extent that the state interest protects petitioner's reputation from adverse publicity, it is indistinguishable from interests in anonymity asserted by juvenile criminal suspects or judges under investigation for alleged misconduct; those interests were found not sufficiently compelling to justify restraints in *Daily Mail, Oklahoma Publishing* and *Landmark Communications*. "[A]bsent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech." *Butterworth v. Smith*, 58 U.S.L.W. at 4366.

Indeed, reputational interests have *never* prevailed over truthful, newsworthy publications in the context of defamation actions, where the First Amendment requires that plaintiffs establish *both* that the publication contained false facts about them *and* that the defendants acted with a degree of fault with respect to the truth or falsity of the statements.

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988).[9] This Court has applied the same dual requirements of fault and falsity to other legal theories, such as false-light invasion-of-privacy, *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967), and to intentional infliction of emotional distress, *Hustler Magazine*.

Petitioner's claims for misrepresentation and breach of contract in the lower courts amounted to little more than an attempt to dress a defamation claim in different garb and avoid the otherwise insurmountable obstacle of truth. He built his case for damages upon the loss of his job. Petitioner's employment with the Martin Williams Advertising Agency ended on the day the articles appeared disclosing his role in publicizing Johnson's misdemeanors. Cohen contends that he was fired (R. 201), although this was sharply disputed at trial (*see* R. 1500-1505, 1740-1743, 1763). His theory of damages is that the newspaper articles damaged his reputation and made him a controversial character that his employer had to fire, and that his own conduct had nothing to do with his employer's reaction (*see* R. 1787-88). If his causation argument is correct, then his damages are entirely reputational.

From opening statement to closing argument, petitioner's trial tactics underscored that his claim was for injury to reputation allegedly arising out of the publication of information. His injuries were characterized repeatedly as "ridicule" and "kick in the face" (R. 45), "great deal of grief and embarrassment" (R. 41), "a continual series of articles on Mr. Cohen" (R. 42), "the embarrassment and humiliation that he has suffered" (R. 66), an "assault on Mr. Cohen in the form of a cartoon" which was "a cross that Mr. Cohen is going to have

[9] The degree of fault varies with the status of the plaintiff. As a public figure (A-5 n.3), petitioner would have to establish actual malice on the part of the newspapers.

to bear for the rest of his life" (R. 1790), and "a cross that his wife and his two daughters are going to have to bear for the rest of their lives" (R. 1791), that Cohen "was humiliated" (R. 1794), an effort "to assassinate the character" of Cohen (R. 1799), and a "cloud hanging over Mr. Cohen's head" (R. 1804). Petitioner's counsel ended his closing statement with these words:

> Dan Cohen has been lied to, he's been humiliated, he and his family, his wife and two daughters have had their name blackened by the newspapers illegal conduct in this case. We ask you, members of the jury, to give justice to Dan Cohen and to restore him and his family, his wife and his two teenage daughters, his good name, so that we can throw this cartoon into oblivion where it belongs. (R. 1814.)

Cohen himself testified that he was "outraged" by disclosure of his "name in such a way as it cost me my job and my reputation" (R. 255). Another witness for Cohen testified that the incident "certainly didn't help [Cohen's] reputation within the ad community" (R. 1241).

These damage arguments are indistinguishable from the claims of injury to reputation, humiliation and embarrassment which give rise to most defamation actions. As this Court recognized in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), the interests protected by state laws of defamation include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *See also Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976). Discharge from employment and denial of employment resulting from injurious publications are traditional forms of special damages in defamation actions. Restatement (2d) of Torts § 575, Comment b, at 198 (1977).

Any state interest in protecting individuals from these sorts of injury has never been enough to impose liability for damages caused by truthful publications under defamation law. Similarly insufficient to justify punishment of truthful publications are state interests in protecting individuals from "the mental distress from having been exposed to public view," *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967); *see also id.* at 388 ("risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press"), or from "outrage, mental distress, shame and humiliation," *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 248 (1974); *accord, Hustler Magazine, Inc.*

Truth always has defeated claims for these types of damages, and it should do so here. Petitioner cannot meet the first step in the dual *Gertz-Hustler Magazine* requirements of falsity and fault. He cannot establish any damages from a false statement of fact, and hence his claim must fail.

(c) Petitioner's Status as a Confidential Source Does Not Present a "Highest Order" Interest.

Petitioner cannot resurrect his claim by invoking a state interest in protecting the identity of confidential sources, as reflected in the Minnesota Free Flow of Information Act, Minn. Stat. § 595.021 *et seq.* (1990). *See* Petitioner's Brief at 27-29. That statute protects the news media and the public's interest in obtaining information, and not the individual interests of the source. Minn. Stat. § 595.022 (1990) ("In order to protect the public interest and the free flow of information, the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information.").

Confidential sources often play an important role in the newsgathering process, but no jurisdiction has given their interests any independently enforceable legal recognition.[10] Confidential sources enjoy common law or statutory protection only in the context of privileges protecting reporters from compulsory testimony in some circumstances:

> However the [journalist's] privilege is applied, it appears to protect the communicator, not the source. Only the reporter may waive the privilege. Minnesota's *Cohen* case [prior to the decision of the Minnesota Supreme Court] alone suggests otherwise. Generally, a broken promise by a reporter raises an ethical question but provides no legal cause of action.

D. Gillmor & J. Barron, *Mass Communication Law: Cases and Comment* 394 (5th Ed. 1990). Claims of privilege under the First Amendment similarly protect the journalist, not the source. *See Branzburg v. Hayes*, 408 U.S. 665, 695 (1972) ("The privilege claimed is that of the reporter, not the informant"); *id.* at 737-38 (Stewart, J., dissenting) ("This protection does not exist for the purely private interests of the newsman or his informant. . . . Rather, it functions to insure nothing less than democratic decisionmaking through the free flow of information to the public.").

---

[10] This factor, among others, distinguishes Cohen's interests from the national security interests in protecting classified information which were the subject of the written employment agreement in *Snepp v. United States*, 444 U.S. 507 (1980), or the privacy interests of the prison inmate who protested being filmed in an "exercise cage" in *Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282 (N.D. Ill. 1986). Nor does this case involve the government's interest in setting conditions on the use of information which the government itself has extracted from an unwilling source, as in *Seattle Times Company v. Rhinehart*, 467 U.S. 20 (1984).

By protecting the listener rather than the speaker in the privileged communication, the journalist's privilege differs from other privileges such as attorney-client, physician-patient, clergy-penitent and marital partners. The few reported cases addressing the issue hold that sources cannot "waive" the privilege and compel unwilling reporters to testify, *United States v. Cuthbertson*, 630 F.2d 139, 147 (3rd Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Palandjian v. Pahlavi*, 103 F.R.D 410, 413 (D.D.C. 1984); *Los Angeles Memorial Coliseum Commission v. National Football League*, 89 F.R.D. 489, 494 (C.D. Cal. 1981); *State v. Boiardo*, 416 A.2d 793, 798 (N.J. 1980), and that sources cannot invoke the privilege to prevent a journalist from testifying if the journalist so chooses, *Small v. UPI*, 1989 U.S. Dist. Lexis 12459 at *3 (S.D.N.Y. 1989) (Roberts, Mag.). Courts in Minnesota have refused to allow witnesses to invoke the statutory privilege to avoid answering questions about their own possible role as sources. *Stuart W. Jamieson v. John Doe and Mary Roe*, Nos. CX-89-406 and CI-89-407 (Minn. Ct. App. March 21, 1989) (reproduced as pages 562-73 of the Joint Appendix to the Minnesota Supreme Court).

Jamieson demonstrates that Minnesota courts will not intervene to protect directly the interests of confidential sources in "anonymity and deniability" even when they clearly have the discretion to do so. This suggests that the State has made no commitment to protect this asserted individual interest of the source (as contrasted with the interests of the public and of the press). "When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition even-handedly, to the small-time disseminator as well as the media giant." *The Florida Star v. B.J.F.*, 491 U.S. at ——, 57 U.S.L.W. at 4820. Courts cannot

credibly assert that the interests of confidential sources are "of the highest order" for purposes of permitting damages awards against news organizations which publish truthful newsworthy information, when neither courts nor legislatures have chosen to protect such sources directly by excusing them from compelled testimony to identify themselves.[11]

Cohen's interest in the present case is even less significant than that of many other confidential sources, because he "willingly entered" the public debate on the 1982 gubernatorial campaign, "albeit hoping to do so on his own terms" (A-13). No journalist asked or persuaded him to divulge information.

---

[11] Dissenting Minnesota Supreme Court Justices Yetka and Kelley complained that the decision below gave the press a special immunity that other corporate or private citizens did not have (A-14-18). Petitioner's Brief sounds the same theme at pages 22-24. In part, their quarrel is with the First Amendment and its extension of special protections to free expression. Even apart from this constitutional consideration, petitioner's criticism proceeds from a mistaken assumption. Courts and legislatures have not shown any inclination to recognize a broad cause of action for broken promises of confidentiality apart from such clearly distinguishable contexts as doctors and lawyers; even in these special contexts, the law sometimes permits or even compels the disclosure of confidential information. *E.g.*, Minnesota Rules of Professional Conduct for Lawyers 1.6(b) (1990); Minn. Stat. § 626.52 (1990) (reporting of suspicious wounds); Minn. Stat. § 626.556 (1990) (reporting of maltreatment of minors); *see Penguin Books USA Inc. v. Walsh*, 1991 U.S. Dist. Lexis 962 (S.D.N.Y. 1991). Furthermore, broken "promises not to tell" are far more likely in the contexts of office conversations, backyard gossip and marital communications than they are in reporter-source relationships, yet reports of lawsuits in these non-media contexts are rare, if they exist at all. The trial court judgment against the newspapers below, like the Florida statute at issue in *Florida Star*, had "every appearance of a prohibition that society is prepared to impose upon the press but not upon itself. Such a prohibition does not protect an interest 'of the highest order.'" *The Florida Star v. B.J.F.*, 491 U.S. at ——, 57 U.S.L.W. at 4821 (Scalia, J., concurring).

He and four other experienced and sophisticated political operatives devised "a political scheme to broadcast a political attack but at the same time to evade responsibility for the act" and "assembled the ingredients for an editorial predicament" (A-54) (Minn. Ct. App.; Crippen, J., dissenting). Cohen attempted to manipulate public opinion through selective disclosures of information. Such efforts do not merit court enforcement. Cohen's desires do not constitute a "highest order" interest (A-55) (Minn. Ct. App.; Crippen, J., dissenting); *see also Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 19 (1986) (Stevens, J., dissenting) ("Neither our elected nor our appointed representatives may abridge the free flow of information simply to protect their own activities from public scrutiny."); *cf.* Posner, *The Right of Privacy*, 12 Ga. L. Rev. 393, 400, 419 (1978); Epstein, *Privacy, Property Rights and Misrepresentation*, 12 Ga. L. Rev. 455, 470, 473-74 (1978).

Finally, the Minnesota Supreme Court found that it was unnecessary to further a state interest in protecting the expectations of confidential sources by allowing petitioner's claims against the newspapers on the facts of this case. This Court should not assign more weight to the purported state interest than it received from the state itself. Under the circumstances of this case, protecting petitioner's desire for anonymity is not a state interest of the highest order.

CONCLUSION

For the foregoing reasons, this Court should dismiss the writ of certiorari. If it reaches the merits of the issue presented, this Court should affirm Part III of the decision of the Minnesota Supreme Court.

Respectfully submitted this 21st day of February, 1991,

JOHN D. FRENCH
JAMES FITZMAURICE
JOHN BORGER*
Faegre & Benson
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 336-3000
Attorneys for Respondent Cowles Media Company
*Counsel of Record

OF COUNSEL:
RANDY M. LEBEDOFF
Cowles Media Company
425 Portland Avenue
Minneapolis, MN 55488
(612) 673-4600

(9)

No. 90-634

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAN COHEN,
PETITIONER

v.

COWLES MEDIA COMPANY,
d/b/a Minneapolis Star and Tribune Company, and
NORTHWEST PUBLICATIONS, INC.,
RESPONDENTS

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF FOR RESPONDENT NORTHWEST PUBLICATIONS, INC.

PAUL R. HANNAH
LAURIE A. ZENNER
Hannah & Zenner
1122 Pioneer Building
336 Robert Street
St. Paul, Minnesota 55101
(612) 223-5525

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
MARK I. LEVY
MICHAEL W. McCONNELL
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

JOHN C. FONTAINE
CRISTINA L. MENDOZA
Knight-Ridder, Inc.
One Herald Plaza
Miami, Florida 33132
(305) 376-3800

Counsel for Respondent
Northwest Publications, Inc.

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

The Minnesota Supreme Court, after holding under state law that petitioner had failed to prove a cause of action for either breach of contract or fraud, concluded that a reporter's promise of confidentiality to petitioner was not enforceable under Minnesota promissory estoppel law. In determining under state law "whether it would be unjust not to enforce the promise," the court considered "all the reasons why it was broken" and "weigh[ed] the same considerations that are weighed [in determining] whether the First Amendment has been violated." Pet. App. A11, A13. The questions presented are as follows:

1. Whether the Minnesota Supreme Court's weighing of the same policies that underlie the First Amendment, as part of its balancing of public policy factors under the state-law doctrine of promissory estoppel, presents a federal question reviewable by this Court.

2. If so, whether the Minnesota Supreme Court properly gave weight to First Amendment considerations where petitioner was a public figure whose identity as the source of the story was itself highly newsworthy and the story conveyed truthful political information about a forthcoming gubernatorial election.

RULE 29.1 STATEMENT

The parent company of respondent Northwest Publications, Inc., is Knight-Ridder, Inc. Northwest Publications, Inc., the publisher of the St. Paul Pioneer Press Dispatch (now named the St. Paul Pioneer Press), has no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: PAGE

MISCELLANEOUS: PAGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-634

DAN COHEN,
PETITIONER

v.

COWLES MEDIA COMPANY,
d/b/a Minneapolis Star and Tribune Company, and
NORTHWEST PUBLICATIONS, INC.,
RESPONDENTS

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF FOR RESPONDENT NORTHWEST PUBLICATIONS, INC.

STATEMENT

At issue in this case is a conflict between two fundamental tenets of journalism: a newspaper's obligation to publish full and accurate information on political issues of importance to the voting public, and its responsibility to honor a reporter's promise of confidentiality to a source. The Minnesota Supreme Court held, as a matter of state law, that the defendant newspapers' decisions to override their reporters' promises of confidentiality to petitioner

did not give rise to a cause of action for breach of contract or fraud. In addition, viewing this case as "fraught with moral ambiguity" (Pet. App. A11), the court concluded that state-law principles of promissory estoppel did not confer upon petitioner a legal right of confidentiality that would preclude the newspapers from publishing truthful and significant political information.

A. The 1982 Minnesota Gubernatorial Election

This case arises out of the 1982 gubernatorial election in Minnesota. The candidates for the ultimately prevailing Democratic-Farmer-Labor ("DFL") party were Rudy Perpich for governor and Marlene Johnson for lieutenant governor. Wheelock Whitney and Loris Krenik were the candidates for governor and lieutenant governor for the Independent-Republican ("I-R") party.

Shortly before the November 2 election, voter polls revealed that the I-R ticket was trailing the DFL ticket by approximately 18 points. Tr. 747. Soon after the polls came out, Loris Krenik appeared on a radio program devoted to the race for lieutenant governor. During the program, the host made reference to the political consequences of "an old criminal offense" committed by one of the candidates, and Krenik decided that an investigation should be made into the background of his opponent, Marlene Johnson. Tr. 142-143.

As a result, Gary Flakne, a former I-R state legislator and Hennepin County Attorney, sought to ascertain whether Johnson had a criminal record. Tr. 141, 581-584, 607. Flakne obtained two public court records concerning Johnson. Tr. 554-559, 584-585. The first record showed that Johnson had been charged with three misdemeanor counts of unlawful assembly in 1969 and that the case had been dismissed in 1970. Pl. Ex. 15. Although not disclosed in

the record Flakne obtained, these charges grew out of a protest against the failure of the City of St. Paul to hire minority workers on public construction projects. Pet. App. A4 n.2.

The second court record reflected a 1970 charge against Johnson for petty theft. Johnson's conviction was set aside eight months later after she had received medical treatment. Pl. Ex. 16. Although again not stated in the court record, this charge related to Johnson's failure to pay for $6 in sewing materials at a time when she was upset and disoriented by her father's recent death. Pet. App. A4 n.2.

On the morning of October 27—just six days before the election—a meeting was convened at Whitney Campaign headquarters. In attendance were petitioner Dan Cohen and Gary Flakne; Arnold Ismach, a professor of journalism at the University of Minnesota and media consultant to the Whitney Campaign; George Thiss, a former I-R chair; and Jerry Olson, a former state legislator. Tr. 141.

At the time of this meeting, petitioner was performing various services for the Whitney Campaign in his capacity as Director of Public Relations at Martin-Williams Advertising. Tr. 138, 1520-1521. Petitioner testified that he was working for the Whitney Campaign during the events that led to this lawsuit and that he planned to charge the Campaign for time spent on the Johnson attack. Tr. 266. In fact, petitioner had long been active in Republican politics, having served on the Minneapolis City Council in 1965-1969 and been its President for the last two years, and having run for mayor of Minneapolis in 1969, sought to regain a City Council seat in 1973, and campaigned for the Republican nomination for Hennepin County Commissioner in 1982. Tr. 275-282.

Petitioner also had extensive experience with the media. He had been a public relations official with the Peace

Corps and was responsible for public relations at Martin-Williams Advertising. Tr. 281, 297-300. Throughout his political and business career, petitioner had dealt with the media on a regular basis (Tr. 277-278, 290-291, 372-373) and often provided information to the press. Tr. 372-373, 486-487, 495. Petitioner also had been a freelance columnist in Minnesota and a contributor of editorial articles for the Minneapolis Star and Tribune ("Star Tribune"). Tr. 125, 289-292.

At the October 27 meeting, Johnson's court records were discussed. As petitioner explained at trial, "a consensus was reached" that they should be disclosed to the public and he "volunteered" to distribute them to the media. Tr. 147, 149. Petitioner and Ismach decided that the records should be provided to the Star Tribune, the St. Paul Pioneer Press Dispatch ("Pioneer Press Dispatch"), the Associated Press ("AP"), and WCCO-TV (the local CBS affiliate).

Petitioner and Ismach decided that Johnson's court records should be leaked to the media without identifying the source of the documents because such information "could damage the [Whitney] campaign." Tr. 150; see also Tr. 378. At the same time, using petitioner to furnish the documents, rather than anonymously providing them in a "plain brown envelope," enhanced their credibility and increased the chances that the media would publicize Johnson's criminal record. Tr. 597-599, 725-728. Accordingly, petitioner and Ismach agreed that petitioner would contact reporters at the four media companies and offer them the Johnson materials on condition of confidentiality. Tr. 150-151, 154, 756.

No one at the October 27 meeting was asked to keep secret the plan for petitioner to leak the documents to the media. Tr. 358, 756. In fact, Ismach called the Whitney Campaign to "let[ ] them know what was happening so that they wouldn't be surprised by it" (Tr. 737, 739) and informed them that petitioner intended to release the Johnson records to the press. Tr. 756.

B. Petitioner's Contacts With The Reporters And Publication Of The Articles

Immediately after the October 27 meeting, petitioner placed calls from Whitney Campaign headquarters to reporters for each of the selected media organizations. He told them that he had information that "may or may not relate to the upcoming statewide campaign" and that he would provide this material if "we can reach an agreement as to the basis on which I give [it to] you." Tr. 151.

Later that day, petitioner met separately with each of the four reporters: Bill Salisbury of the Pioneer Press Dispatch, Lori Sturdevant of the Star Tribune, Gerald Nelson of the AP, and David Nimmer of WCCO-TV. Petitioner stated that he would provide certain material to each reporter if the reporter promised to maintain petitioner's anonymity and not to question him about his source. Pet. App. A3.

Each reporter, without being told anything further and before seeing the documents, agreed to petitioner's terms. Tr. 155-157, 165, 172-173, 176. Salisbury was not informed that the material had been given to other reporters (Tr. 416-417); Sturdevant, however, after promising anonymity, asked whether she had the documents on an exclusive basis and was told that she did not. Tr. 158-159, 450; Pet. App. A23. Although the reporters generally knew that petitioner was active in I-R politics and involved in the Whitney Campaign, at no time did petitioner mention that fact or indicate that he was acting in his capacity as a Whitney Campaign adviser. Tr. 368-370.

The four media companies reached different editorial judgments on the best way to handle the story of Johnson's criminal record and petitioner's clandestine disclosure of that material. As explained below, the Star Tribune and the Pioneer Press Dispatch independently decided on October 27 to publish both the fact of Johnson's record and petitioner's role as the source of that information, and their stories ran the next day. This was the first and only time that either of these newspapers had breached a promise of confidentiality. Pet. App. A24, A25. The AP wrote an article regarding Johnson's record but not disclosing petitioner's identity, stating only that court documents "were slipped to reporters." J.A. 11; Tr. 395. And WCCO-TV gave no coverage at all, based upon Nimmer's recommendation that it was not "fair to the [Perpich-Johnson] campaign." Tr. 491, 504.

1. **The Editorial Decision Of The Star Tribune.** The deliberations at the Star Tribune vividly illustrate the dilemma that confronted the press in this case. After being informed by Sturdevant of Johnson's criminal record and the promise of confidentiality to petitioner, editors at the Star Tribune sent another reporter, David Anderson, to check the original file. Anderson located the records, which showed that Gary Flakne had signed them out the previous day and that no one else had examined them for many years. Tr. 1572-1574, 1599-1600. Anderson was familiar with Flakne's name and knew that he was active in Republican politics. Tr. 1573. Anderson immediately telephoned Flakne, who admitted that he had signed out Johnson's court records and that he " 'did it for Dan Cohen.' " Tr. 1601.[1]

[1] Both the Minnesota Supreme Court (Pet. App. A4) and the Minnesota Court of Appeals (*id.* at A24) specifically determined that Flakne told Anderson that he had obtained the records for petitioner. Although petitioner, in his brief in the Minnesota Supreme Court (at 6-7), disputed Flakne's conversation with Anderson, this Court should accept that fact in light of the concurrent determinations of two courts below (see, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 351 (1987); *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160 (1952)), which are fully supported by the record. Tr. 325-326, 356, 1640.

(Footnote continued on following page)

Anderson's investigation left no doubt that Flakne had obtained the records for petitioner and that it was part of an eleventh-hour plan to discredit the DFL ticket. Tr. 1603-1604. At the same time, however, both Wheelock Whitney himself and Jann Olsten, the Whitney Campaign manager (who had learned of petitioner's role from Ismach (see pages 4-5, *supra*)), attempted to distance the Campaign from petitioner's activities, stating that petitioner had acted without the knowledge or permission of Whitney or his staff. J.A. 2. As Olsten added: "I don't know how Cohen got the information about Johnson—he must have looked it up in the records." *Ibid.*

The Star Tribune had not yet decided whether or what kind of article to publish, and the matter was vigorously discussed at the editors' daily news huddle. Various options were considered: to publish no article at all because the story of Johnson's 12-year-old misdemeanor record was not newsworthy; to run an article reporting Johnson's record and also disclosing petitioner's identity as the source of the documents, since the fact that the information came from a Whitney ally was itself highly newsworthy; to protect the confidential source at all costs regardless of considerations of newsworthiness; and to reveal the connection between the Whitney Campaign and the information by using a veiled reference that would not identify petitioner's name (such as "a Whitney Campaign adviser" or "a Whitney supporter").

Later that evening, approximately one hour before press time, Assistant Managing Editor Mike Finney and Manag-

ing Editor Frank Wright made the final decision to publish the story of Johnson's criminal record and to disclose petitioner as the source. Tr. 450-451, 1142-1143, 1148, 1232, 1234, 1302. They rejected the alternatives to full and candid disclosure as inadequate in this situation. The option of not printing any story at all was regarded as unsatisfactory for three reasons: Johnson's criminal record was in fact newsworthy; several other news organizations had the information, and therefore the information was likely to come out anyway and should be available to Star Tribune readers; and, if it did not publish the story, the Star Tribune would be exposed to charges of a cover-up to protect the Perpich Campaign, which the newspaper had endorsed a few days earlier. Tr. 1310-1311, 1475-1476, 1639.

The Star Tribune also decided against disclosing Johnson's criminal record without revealing its source. In the present context, the identity of the source was considered to be at least as newsworthy as the information concerning Johnson. Tr. 1310-1311, 1639. Furthermore, the Whitney Campaign denied any involvement in the release of the Johnson information, and the Star Tribune's failure to identify the source would have allowed that false statement to remain uncorrected just before the election. Tr. 1312-1313, 1639.

For much the same reason, a veiled reference to the source was viewed as an unsatisfactory solution. Since the Whitney Campaign disclaimed any responsibility, an attribution to a "Whitney Campaign adviser" or "Whitney supporter" would have left the public hanging, without any basis for evaluating the conflicting contentions and reaching the truth. Moreover, such a vague description of the source would have unfairly cast suspicion on a large number of innocent people, including Whitney himself. Tr. 1150-1152, 1405-1406, 1488. Finally, petitioner's identity was becoming more widely known and had been learned from independent sources, which the newspaper concluded voided the assurance of confidentiality. Tr. 1639-1641.

Accordingly, while Sturdevant disagreed with the decision and asked that her name not appear on the story (Tr. 452), the Star Tribune determined that a specific and complete article was the best course. Sturdevant advised petitioner that his name would be included in the article that would appear the next day. Tr. 455-457, 1144-1145.

2. The Editorial Decision Of The Pioneer Press Dispatch. The Pioneer Press Dispatch independently reached the same editorial judgment. Tr. 1370. The Dispatch sent a reporter to confirm the accuracy of the court records and spoke with Johnson about them. Tr. 1446. The newspaper also investigated petitioner's involvement in the Whitney Campaign (Tr. 1555) and obtained confirmation from Whitney Campaign director Olsten that petitioner was the source of the documents. Tr. 1437; J.A. 10.

The Dispatch's editorial judgments in this case were made by David Hall, the Executive Editor of the newspaper, in consultation with Doug Hennes, its City Editor. Tr. 1424, 1428-1432. Hall explained his reasoning as follows (Tr. 1430-1431):

> I felt like * * * it was a factor in her background, we were going to make people aware of it, but that given the * * * way it was being done, the proximity to the election, the oldness of the charge, that I thought that a part of the total story for the readers, people who were going to be asked in a very short time to cast a vote in an important election, an election involving the Governor of the State of Minnesota, that the readers needed to know the circumstances, the total circumstances under which that information was being made available, and let them draw their own conclusions about what the motives of that were.

In reaching his decision, Hall rejected the option of not running any story at all. Because "four news organizations" had Johnson's records, "I was rather certain that this story was going to be published. The information was going to be before voters. I wanted our readers to have

that information and I wanted them to have as complete * * * information as possible." Tr. 1438.

In addition, because of the importance of petitioner's identity and the Whitney Campaign's repeated denials that it was "behind bringing to light" Johnson's criminal record (J.A. 10; Tr. 1436-1437), Hall did not "ever consider[ ] doing it another way other than using his name." Tr. 1440. Hall testified that the AP's story was "journalistically deficient" because it did not name the source despite the conflict between Johnson's accusations that the Whitney Campaign had leaked the story and the Campaign's denials of any involvement. Tr. 1439.

Hall also explained his decision to reveal petitioner's name despite the objection of the reporter involved. First, Hall did not think that the reporter should have promised confidentiality without first checking with an editor, as required under the written policies of the Pioneer Press Dispatch. Tr. 1425-1427, 1440. More importantly, Hall believed that his principal obligation as editor of the newspaper was to "the readers [who] needed to be informed and served. * * * That was the overriding concern [in] making that decision." Tr. 1440-1441.

Hall testified that the decision to publish, although made under severe time constraints, was reached "reluctantly." Tr. 1442. While keeping promises was "an important factor to be considered," it was "but one of many" (Tr. 1463) and was outweighed here by the newspaper's paramount obligation to its readers and the voting public.

Because of the story's significance, Hall remained involved even after he made the decision to publish. Hall had the article read to him at home that evening, which is done only when "you are particularly concerned." Tr. 1432-1433. Hall then revised the draft to give less prominence to petitioner's identity and to set forth the facts "in a straightforward and nonjudgmental manner" that

would "let voters decide for themselves about how to treat this." Tr. 1434-1435; see also Tr. 1558-1559.

Before publication of the story, Salisbury called petitioner to advise him of the Dispatch's decision to print his name. Tr. 419. When petitioner learned that the decision was final, he gave the newspaper a further statement, part of which appeared in the article. Tr. 1555-1558.

C. The Litigation Below

1. Trial Court Proceedings. In 1982, petitioner brought this action in state court against the Star Tribune and the Pioneer Press Dispatch. Petitioner had no cause of action for defamation because the information disclosed was true and was not published with "actual malice" under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).[2] Nor could petitioner sue for an invasion of privacy, since Minnesota does not recognize that tort[3] and in any event petitioner's involvement in the Whitney Campaign and his role in the leak of Johnson's records were not private matters. Accordingly, petitioner's complaint alleged two claims: breach of contract and fraud.

The trial court denied the newspapers' motion for summary judgment. Pet. App. A77-A88. The court rejected the contention that the First Amendment prevented the imposition of liability in this case, stating that the "Court can perceive no constitutional dimension in the case at bar." *Id.* at A88. Following trial, the jury found for petitioner on both the contract and fraud counts, and it awarded $200,000 in compensatory damages and $500,000 in punitive damages. *Id.* at A71.

---

[2] As the Minnesota Supreme Court correctly held, and as petitioner does not here dispute, petitioner "would qualify as a public figure." Pet. App. A5 n.3. Furthermore, in the context of the gubernatorial election, the source of the information against Johnson clearly was a matter of public interest.

[3] See, *e.g.*, *Ruzicka* v. *Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1302 (D. Minn. 1990).

2. The Minnesota Court Of Appeals Decision. The Minnesota Court of Appeals reversed the fraud and punitive damages verdicts but affirmed the breach-of-contract verdict. Pet. App. A19-A61. The court unanimously held that there was no fraud under Minnesota law in light of the "direct evidence of both the reporters' and editors' intentions" (*id.* at A40) and petitioner's concession that "the reporters themselves intended to perform the contracts and that they did not commit misrepresentations." *Ibid.* Because punitive damages rested solely on the invalid fraud count, the court also set aside that award. *Id.* at A41-A42.

By a divided vote, the court of appeals upheld the contract verdict. Believing that, under Minnesota law, petitioner and each newspaper had entered into a contract for confidentiality (Pet. App. A34-A35), the majority concluded that petitioner's lawsuit did not constitute state action, that in any event petitioner's interest in enforcement of his rights under the contract outweighed any First Amendment interest, and that the reporters' promises of confidentiality represented a waiver of any First Amendment right. *Id.* at A28-A37.

Judge Crippen dissented. Pet. App. A45-A61. He found state action in the "judicial decree that the [newspapers'] choice to publish information is unlawful and subject to the sanction of a money judgment." *Id.* at A47. On the merits, he concluded that an adverse judgment against the newspapers "usurps editorial decisionmaking and chills exercise of press freedom. * * * It is for editors, not for judges, to determine whether identification should be made and to decide when publication is important." *Id.* at A48-A49. Finally, Judge Crippen concluded that the newspapers' right to publish had not been waived because the reporters' promises were not valid contracts and in any event did not satisfy the "stringent conditions" required "for waiver of [the newspapers'] first amendment press freedoms." *Id.* at A55-A56.

3. The Minnesota Supreme Court Decision. The Minnesota Supreme Court unanimously affirmed the court of appeals' ruling that, as a matter of state law, judgment should be entered for the newspapers on the fraud count and that the punitive damages award must be set aside. The court explained (Pet. App. A6-A7) that petitioner

> admits that the reporters intended to keep their promises * * *. Moreover, * * * the editors had no intention to reveal [petitioner's] identity until later when more information was received and the matter was discussed with other editors. These facts do not support a fraud claim.

The court also reversed the breach-of-contract verdict on the ground that a reporter's promise of confidentiality is not legally enforceable and does not constitute a binding contract under Minnesota law. Pet. App. A7-A10. As the court explained, state law does not "consider binding every exchange of promises" and "[w]e are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract." *Id.* at A9. The court also recognized that promises of confidentiality can properly be disregarded in some situations. *Id.* at A7-A8 n.4.

In light of the special nature of the reporter-source relationship, "contract law seems here an ill fit for a promise of news source confidentiality. To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship." Pet. App. A10. Rather, characterizing the reporter-source relationship as "an 'I'll-scratch-your-back-if-you'll-scratch-mine' accommodation" (*id.* at A9), the court determined that Minnesota law requires "[e]ach party * * * [to] assum[e] the risks of what might happen, protected only by the good faith of the other party." *Id.* at A10. Even though "a contract cause of action is inappropriate" (*ibid.*), journalists' "keeping of promises is professionally im-

portant" and "it appears that journalistic ethics have adequately protected confidential sources." *Id.* at A8.

Having held that no contract existed under state law, the Minnesota Supreme Court considered whether a newspaper nonetheless could be held liable for breach of a reporter's promise of confidentiality under the doctrine of promissory estoppel, even though that theory neither had been presented to the jury nor briefed by the parties. Pet. App. A10-A11 & n.5. Under Minnesota law, "promissory estoppel implies a contract in law where none exists in fact" if "injustice can be avoided only by enforcing the promise." *Id.* at A10.

The court emphasized that it faced "a transaction fraught with moral ambiguity." Pet. App. A11. Petitioner sought "[a]nonymity" in order to have "deniability, but deniability, depending on the circumstances, may or may not deserve legal protection." *Ibid.* Thus, to determine whether it was necessary to impose liability for breach of the promise in order to avoid injustice, the court "inquir[ed] * * * into all the reasons why it was broken." *Ibid.*

Among the factors that the Minnesota Supreme Court weighed in the equitable balance were the same public policies that underlie the First Amendment. "In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated." Pet. App. A13.

> For example, was Cohen's name "newsworthy"? Was publishing it necessary for a fair and balanced story? Would identifying the source simply as being close to the Whitney campaign have been enough? The witnesses at trial were sharply divided on these questions. Under promissory estoppel, the court cannot avoid answering these questions * * *.

Ibid. In particular, the court's promissory estoppel analysis took into account that "in this case * * * the promise

of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign." *Ibid.* On the other side of the scale, the court recognized that petitioner "willingly entered [the public debate] albeit hoping to do so on his own terms" (*ibid.*) in order to hide behind the protection of deniability.

Based on its equitable weighing of the competing factors, the court concluded that "[i]n this context, and considering the nature of the political story involved, it seems to us that the law best leaves the parties here to their trust in each other" and without a legally enforceable estoppel remedy. Pet. App. A13. The court emphasized that its ruling was narrow and that it was "not * * * decid[ing] more than we have to decide." *Id.* at A14. In other cases, the court pointed out, "[t]here may be instances where a confidential source would be entitled to a remedy such as promissory estoppel," depending upon the balance of the "interest in enforcing the promise to the source" against the "First Amendment considerations" in favor of full and candid disclosure (*ibid.*), and therefore the decision does not grant the press a license to break promises with impunity. "[B]ut this is not such a case," and petitioner's claim is not "sustainable under promissory estoppel." *Ibid.*

SUMMARY OF ARGUMENT

The Minnesota Supreme Court held, as a matter of state law, that petitioner failed to establish any claim for fraud or breach of contract. These state-law holdings were sufficient to overturn the jury verdict in its entirety.

Instead of simply reversing and ordering judgment for respondents, however, the Minnesota Supreme Court proceeded to discuss an issue that had not been presented to the jury or briefed by the parties: whether petitioner could enforce the reporters' assurances of confidentiality

under the doctrine of promissory estoppel. Under Minnesota law, promissory estoppel creates a legally implied obligation where no contract exists in fact, based on a flexible balancing of public policy considerations to determine whether enforcement of a promise is necessary to avoid injustice. The court explained that formal contract law is too rigid to be imposed on the unique relationship between reporter and source, but that promissory estoppel takes into account all reasons why the promise was broken, including the interest of the newspaper and the public in the publication of truthful political information.

The court concluded that petitioner did not have a legally enforceable promissory estoppel claim. On the one hand, petitioner had no substantial interest under state law in being permitted to conceal his involvement—and that of the Whitney Campaign—in the attack upon the DFL ticket. On the other hand, the newspapers' disclosure of petitioner's role was accurate and related directly to the rapidly approaching gubernatorial election. In these circumstances, there was no injustice in denying petitioner a legal remedy against the newspapers. At the same time, the court stated that the equitable balance could be different in other cases, emphasizing that its ruling on the particular facts presented here did not broadly authorize newspapers to violate promises of confidentiality in the future.

Petitioner's entire submission in this Court is premised on the assumption that the Minnesota Supreme Court believed itself constrained by the First Amendment to rule in favor of the newspapers. Although the court's promissory estoppel discussion does refer to the First Amendment, the opinion makes clear that the court simply weighed, as one relevant factor under state promissory estoppel law, the interest of the newspapers and the public in the dissemination of truthful political information. The federal Constitution does not speak to a state court's determination to further, wholly as a matter of state law and policy,

the same values that are embodied in the First Amendment. The decision below does not fairly suggest that it "rested * * * primarily on" or was "controlled" by federal law. *Michigan* v. *Long*, 463 U.S. 1032, 1042, 1044 (1983). Furthermore, in accord with fundamental principles of judicial restraint, any ambiguity in the decision should be resolved to avoid rather than raise a constitutional question. Because the judgment of the Minnesota Supreme Court rests on a state-law ground that is independent of federal law, this Court lacks jurisdiction to hear this case and the writ of certiorari should be dismissed.

In any event, even if the Court concludes that the jurisdictional presumption of *Michigan* v. *Long* is satisfied here, the result reached by the Minnesota Supreme Court is fully consistent with the First Amendment. Because the court held that no contract or fraud claim accrued under Minnesota law, the federal question raised is not, as petitioner asserts, whether the First Amendment overrides rights recognized under state law; instead, it is whether the court erred in giving weight to First Amendment considerations in the equitable balance required by the state-law doctrine of promissory estoppel. Since, under state law, petitioner had no substantial interest in "deniability," even a modest First Amendment interest in public disclosure would sustain the judgment below. But in fact the decisions of this Court establish that the publication of truthful information concerning a political campaign is at the core of the First Amendment's protection, and hence the newspapers' identification of petitioner was supported by a compelling constitutional interest that manifestly outweighed petitioner's limited interest under Minnesota law.

Petitioner's argument reduces to the assertion that promises of confidentiality may never be overridden, no matter how strong the public interest in disclosure. Such an inflexible approach finds no support in legal precedent or

journalistic ethics. Responsible journalists throughout the country have recognized that, on rare but important occasions, promises of confidentiality must give way to a higher duty of full disclosure to the public. In this context, the Minnesota Supreme Court properly weighed *all* relevant considerations of public policy—including the public interest in free discussion of political issues—in the equitable balance.

Petitioner cannot avoid the import of the First Amendment by arguing that there is no state action in this case. In light of the Minnesota Supreme Court's holding that no contract existed, any cause of action against the newspapers must rest on promissory estoppel, which creates a legal obligation never assumed by the parties. State law also would provide judicial enforcement of that legal obligation. Imposing and enforcing such an obligation would plainly constitute state action under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

Finally, contrary to petitioner's assertion, the reporters' promises of confidentiality did not effect a waiver of any First Amendment rights. Petitioner's contention begs the question before the Court, which is whether the First Amendment protects the newspapers' disclosure of his identity *notwithstanding* the reporters' assurances. Furthermore, because the reporters did not possess sufficient information to make an informed and conscientious assessment of the newsworthiness of petitioner's role, their promises did not meet the stringent standard of a knowing and intelligent waiver—a standard that is especially appropriate here in view of the public's interest in the publication of petitioner's identity and the responsibility of editors as well as reporters for the exercise of the newspapers' First Amendment rights.

ARGUMENT

I. BECAUSE THE DECISION BELOW IS GROUNDED IN STATE RATHER THAN FEDERAL LAW, THE WRIT OF CERTIORARI SHOULD BE DISMISSED

The Minnesota Supreme Court's judgment is grounded in state rather than federal law. Because state law provides an independent and adequate ground for the decision below, the writ of certiorari should be dismissed.

It is axiomatic in our federal system that this Court lacks jurisdiction to review a state court's determination of state law. "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126 (1945). Under this principle, "the views of the State's highest court with respect to state law are binding on the federal courts." *Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983).

As a corollary to this jurisdictional limitation, it is well settled that the Court "will not review judgments of state courts that rest on adequate and independent state grounds." *Herb* v. *Pitcairn*, 324 U.S. at 125. Accordingly, when a state decision refers to both federal and state law and the state-law ruling is "an independent and adequate * * * ground supporting the judgment below * * *, our review is at an end, for we have no authority to review state determinations of purely state law. Nor do we review federal issues that can have no effect on the state court's judgment." *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380, 387 (1986). As the Court explained in *Herb* v. *Pitcairn*, 324 U.S. at 126:

> We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Not all state-law rulings, of course, are independent of federal law. If "the state court felt *compelled* by what it understood to be federal constitutional considerations to construe * * * its own law in the manner it did, then we will not treat a normally adequate state ground as independent." *Michigan* v. *Long*, 463 U.S. 1032, 1038 n.4 (1983) (emphasis added; citations and internal quotation marks omitted). Likewise, the Court has jurisdiction "where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter." *Ibid.* But, if the federal authorities cited by the state court "are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached," the ruling is one of state law and outside the jurisdiction of this Court. *Id.* at 1041.

In cases where both state and federal authorities are cited, it may be unclear whether the state ground is independent of federal law. See *Long*, 463 U.S. at 1037-1040. To guide resolution of such cases, the Court has established the following presumption: "when * * * a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1040-1041.

Under the foregoing principles, the decision below rests on independent (and unquestionably adequate) state-law grounds and therefore is not subject to review in this Court. With respect to the holdings that petitioner failed to establish a claim for fraud or breach of contract, it is abundantly clear that these rulings were premised entirely on Minnesota law. The only authorities cited by the Minnesota Supreme Court involved decisions of state law, and there is not so much as a mention of federal law in these

portions of its opinion. See Pet. App. A6-A10. Indeed, the court explicitly disclaimed any consideration of "First Amendment implications" in deciding those issues. *Id.* at A12-A13. These circumstances amply meet the "plain statement" rule of *Long*.

The same conclusion also applies to the court's analysis of promissory estoppel. *First*, the court relied solely on state-law authorities to support its promissory estoppel discussion. See Pet. App. A10-A14. Thus, it does not "fairly appear[ ] in this case that the [Minnesota] Supreme Court rested its decision primarily on federal law." *Long*, 463 U.S. at 1044.[4]

While the First Amendment is referred to in several places, a fair reading of the opinion demonstrates that the court merely weighed, as one of the policies to be considered in the equitable balance under state promissory estoppel law, "the same considerations that are weighed for whether the First Amendment has been violated." Pet. App. A13. The state court surely was free, as a matter of Minnesota law, to apply the flexible state doctrine of promissory estoppel in a manner that furthers the same policies of free expression that underlie the First Amendment.[5] The Minnesota Supreme Court simply considered

---

[4] Indeed, only two federal decisions are even cited in the promissory estoppel analysis: *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), which the court adverted to (Pet. App. A13) in explaining that state promissory estoppel law required courts to inquire into the reasons why confidentiality was breached "even though to do so would mean second-guessing the newspaper editors"; and *Florida Star* v. *B.J.F.*, 109 S. Ct. 2603 (1989), which the court quoted (Pet. App. A14) to reinforce the wisdom of rendering a narrow decision that does not extend beyond the " 'discrete factual context.' "

[5] Under Minnesota law, promissory estoppel "is an equitable doctrine" that is applicable where necessary "to avoid injustice." *AFSCME Councils* v. *Sundquist*, 338 N.W.2d 560, 568 & n.10 (Minn. 1983). See also, *e.g.*, *United Elec. Corp.* v. *All Serv. Elec., Inc.*, 256 N.W.2d 92, 95, 96 (Minn. 1977) (citation omitted) ("promis-

(Footnote continued on following page)

the policies embodied in the First Amendment to be relevant and persuasive as a matter of state law, and it therefore looked to those policies "only for the purpose of guidance" (*Long*, 463 U.S. at 1041); this approach does not suggest that the First Amendment itself "compel[led] the result that the court * * * reached" (*ibid.*) or " 'controlled the decision below.' " *Id.* at 1040 (citation omitted).

To be sure, certain passages in the Minnesota Supreme Court's opinion, if taken out of context, might be read to go further and hold that the First Amendment required the result reached. As just explained, however, that is not a fair reading of the decision as a whole. This Court "reviews judgments, not statements in opinions," and when "unnecessarily broad statements are made," it is the Court's "duty to look beyond the broad sweep of the

---

[5] *continued*
sory estoppel is equitable in nature" and applies " 'if injustice can be avoided only by enforcement of the promise' "). The hallmark of this doctrine is its flexibility, which enables courts to balance all relevant policy considerations; by contrast, "[a] conventional contract approach, with its strict rules of offer and acceptance, tends to deprive the analysis of the relationship between the [parties] of a needed flexibility." *Christensen* v. *Minneapolis Mun. Emp. Retire. Bd.*, 331 N.W.2d 740, 747 (Minn. 1983). Under promissory estoppel, courts analyze each case in the manner that is most "realistic, fair and practical" and, in particular, in light of the "paramount * * * public interest." *Id.* at 748.

Well before the First Amendment was applied to defamation claims in *New York Times Co.* v. *Sullivan*, the Minnesota Supreme Court had established a common-law privilege for matters of public concern in order to protect the paramount public interest in free expression. See *Marks* v. *Baker*, 9 N.W. 678 (Minn. 1881); *Hammersten* v. *Reiling*, 115 N.W.2d 259, 264 (Minn. 1962). This privilege has particular application to the conduct of governmental affairs, including election campaigns. See *Wilcox* v. *Moore*, 71 N.W. 917, 918 (Minn. 1897) ("[i]f [a candidate or official] has resorted to a dishonorable trick, it is proper to publish the fact"); *Friedell* v. *Blakely Printing Co.*, 203 N.W. 974, 975 (Minn. 1925), cited in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 n.20 (1964). Accordingly, it was entirely proper for the Minnesota Supreme Court to consider, under state law, the goal of free political expression as a relevant factor in the equitable promissory estoppel balance.

language and determine for [itself] precisely the ground on which the judgment rests." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297-298 (1956). See also, *e.g.*, *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 734-735 (1978). As this case well illustrates, indiscriminate application of *Long* would "cause the Supreme Court to waste its limited resources by reaching out to make unnecessary decisions on grave and difficult federal questions." P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 553-554 (3d ed. 1988).

Second, the conclusion that the Minnesota Supreme Court's decision does not rest on federal law is confirmed by the fact that the court did not resolve the related issue of state action. The Minnesota Court of Appeals had ruled that no state action was present in this case and therefore that the First Amendment was inapplicable. See Pet. App. A28-A31. If the Minnesota Supreme Court had intended to base its decision on the First Amendment, it would have been required to decide the question of state action. In fact, however, the court simply noted the question in passing and set out (without deciding) the parties' competing contentions. *Id.* at A12 n.6. The court's failure to adjudicate the state action issue is compelling evidence that its decision is not premised on the commands of the First Amendment.[6]

---

[6] In the same vein, the Minnesota Supreme Court never resolved the "waiver" issue relied on by the appellate court (Pet. App. A35-A37) as a ground for refusing to apply the First Amendment. Likewise, the court simply balanced the conflicting claims of petitioner and respondents as required by state estoppel law, and did *not* attempt to apply the First Amendment tests established by this Court, which require that a state interest be not only "legitimate" but "compelling" (*Brown* v. *Hartlage*, 456 U.S. 45, 53-54 (1982)) and "of the highest order" (*Florida Star* v. *B.J.F.*, 109 S. Ct. 2603, 2609 (1989)) to outweigh First Amendment interests. Plainly, the Minnesota Supreme Court could not have bypassed these issues if it had predicated its ruling on the First Amendment.

Third, once unreviewable issues of state law are removed from consideration in this case, it is evident that no meaningful First Amendment question is left for decision. The Minnesota Supreme Court recognized, as a matter of state law, that petitioner had no substantial "common law interest in [enforcing] a promise of anonymity" (Pet. App. A13) because he "willingly entered" the "public debate" (*ibid.*), and his effort to use the media to impugn the opposing candidate while insulating his own candidate from accountability was "fraught with moral ambiguity." *Id.* at A11. Indeed, the promise of "deniability" did not even rise to the level of a contract right under Minnesota law. Since the Minnesota Supreme Court disclaimed any significant state interest in allowing petitioner to enforce a promise of anonymity, and since that issue is entirely one of state law that this Court cannot reconsider, any First Amendment interest on the other side of the scale would be sufficient to outweigh petitioner's claim. For this reason, whatever First Amendment issue may inhere in this case can come out only one way—an affirmance of the judgment below. Such a trivial and preordained question hardly is appropriate for this Court's review.

Fourth, the absence of a reviewable federal issue is further shown by the fact that the Minnesota Supreme Court's discussion of promissory estoppel is dictum. That issue was never presented to the jury or briefed at any stage. A claim never raised at trial and waived on appeal cannot support a damages award. See, *e.g.*, *Flooring Removal, Inc.* v. *Ryerson*, 447 N.W.2d 429, 430 (Minn. 1989). Accordingly, the Minnesota Supreme Court's promissory estoppel analysis had no effect on petitioner and simply represents a warning for future cases that newspapers do not possess a blanket right to violate promises of confidentiality. On this record, the issues posed by petitioner come to this Court "in [a] highly abstract form" inappropriate for definitive resolution. *Rescue Army* v.

Municipal Court, 331 U.S. 549, 575 (1947). Both prudential and jurisdictional considerations forbid this Court to review such an advisory opinion or to declare constitutional principles that have no realistic prospect of affecting the judgment below. See *Doremus* v. *Board of Education*, 342 U.S. 429 (1952).

Finally, prudential principles of judicial restraint counsel against review in this case. "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng* v. *Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 445 (1988). In prior cases, the "Court has relied on that principle * * * to resolve doubts about the independence of state-law decisions in favor of an interpretation that avoids a constitutional question." *Three Affiliated Tribes* v. *Wold Engineering*, 467 U.S. 138, 158 (1984). Moreover, the rule that the Court reviews judgments rather than statements in opinions takes on "special force when the statements raise constitutional questions, for it is our settled practice to avoid the unnecessary decision of such issues." *FCC* v. *Pacifica Foundation*, 438 U.S. at 734. See also *Black* v. *Cutter Laboratories*, 351 U.S. at 299-300 ("even if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question"). Here, the Court's "responsibility to avoid unnecessary constitutional adjudication" (*Three Affiliated Tribes*, 467 U.S. at 158) requires deference to the reasonably available state-law ground for sustaining the decision below, thereby obviating the federal constitutional issue that otherwise would be presented.

For these reasons, the writ of certiorari should be dismissed. See, *e.g.*, *Ohio* v. *Huertas*, cert. dismissed as improvidently granted, No. 89-1944 (Jan. 22, 1991); *Colorado* v. *Nunez*, 465 U.S. 324 (1984) ("[t]he writ is dismissed as improvidently granted, it appearing that the judgment of the court below rested on independent and adequate

state grounds"); *Florida* v. *Casal*, 462 U.S. 637 (1983) (same). Dismissal is required even though the jurisdictional defect becomes apparent after the case has been briefed and argued on the merits. See, *e.g.*, *Benz* v. *New York State Thruway Authority*, 369 U.S. 147 (1962); *Black* v. *Cutter Laboratories*, *supra*. If the Court is convinced after "the case has been fully briefed and argued" that "a jurisdictional fault" exists, it "will be compelled to dismiss the case * * * despite the expenditures of time and energies." R. Stern, E. Gressman, & S. Shapiro, SUPREME COURT PRACTICE 174 (6th ed. 1986).[7]

II. THE MINNESOTA SUPREME COURT DID NOT ERR IN GIVING WEIGHT TO FIRST AMENDMENT CONSIDERATIONS

If, contrary to the above submission, the Court determines under *Michigan* v. *Long* that the decision below does not rest upon an independent state ground, the judgment of the Minnesota Supreme Court should be affirmed. Assuming that the court's generalized references to the First Amendment are sufficient to invoke *Long*'s presumption of jurisdiction, the fairest reading of the decision on the merits is that the Minnesota Supreme Court *chose* to take First Amendment considerations into account in its promissory estoppel analysis. Nothing in the First Amendment prohibited the state court from considering First Amendment policies as one of the relevant factors in its equitable balancing.

Even if this Court concludes, however, that the Minnesota Supreme Court believed it was *required* to weigh First Amendment considerations in the balance, there was

[7] At the least, the Court should remand this case to the Minnesota Supreme Court for clarification of the basis for its decision. See, *e.g.*, *Long*, 463 U.S. at 1041 n.6 (remand is appropriate where "clarification is necessary or desirable"); *Capital Cities Media, Inc.* v. *Toole*, 466 U.S. 378 (1984) (post-*Long* remand to clarify whether decision was based on state or federal ground).

no constitutional error in the judgment below. To begin with, the court applied a simple balancing approach in holding in favor of the newspapers. This is the least protective standard conceivable for First Amendment rights and, unlike other tests (such as the "compelling state interest" test), it places no special priority on the First Amendment interests involved. That legal test plainly was not, as petitioner argues, too solicitous of First Amendment values.

Moreover, the sole claim raised by petitioner is that the First Amendment is *irrelevant* to the Minnesota Supreme Court's analysis, *i.e.*, that the court erred in giving *any* weight to First Amendment interests. That claim is insubstantial. In light of this Court's precedents, it is impossible to see how the First Amendment could not be relevant to a state court's decision—under general principles of equity and public policy—whether to impose damages liability on a newspaper for the publication of truthful political information. The Court need decide no more to dispose of petitioner's First Amendment argument.

In any event, it is completely untenable to conclude that the Minnesota Supreme Court gave too much weight to First Amendment interests in applying the balancing test. On one side of the scale, the court held that petitioner had no substantial state-protected interest in light of two factors: state law did not provide him with a contractual right to enforce the promise of anonymity, and failure to enforce the promise would not be "unjust" (Pet. App. A13) because of the "moral ambiguity" of petitioner's eleventh-hour scheme to discredit Johnson's political campaign while maintaining "deniability." *Id.* at A11. Given petitioner's negligible interest under Minnesota law, even a modest First Amendment interest on the other side of the scale would be sufficient to predominate. But in fact, as the Minnesota Supreme Court correctly recognized, there was a strong First Amendment interest in the publication of *truthful information* directly relevant to a

matter of *substantial public importance*—an impending statewide gubernatorial election. There can be no doubt either that such publication is at the core of the First Amendment's protections or that this significant First Amendment interest outweighs petitioner's limited interest under Minnesota law.[8]

Before addressing these points in greater detail, it is necessary to correct petitioner's misstatement of the issue presented for review. First, contrary to the Question Presented in his petition and brief, the Minnesota Supreme Court did not "grant newspapers immunity" from damages for breach of promises of confidentiality. See also Pet. Br. 26-27. Quite the opposite, the court made unmistakably clear that in other circumstances a confidential source could "be entitled to a remedy such as promissory estoppel" and that, in holding for the newspapers "in this case," it was neither "decid[ing] more than we have to decide" nor going beyond this " 'discrete factual context.' " Pet. App. A13-A14 (citation omitted). Such a narrow and carefully limited result is a far cry from the asserted immunity that petitioner protests against.

Second, and more fundamentally, petitioner repeatedly but incorrectly treats this case as though it involved a legally enforceable "contract[ ]" (Pet. Br. 17) that was overridden by the First Amendment. In his view, the issue here concerns a "bargain[ ]" between the parties (*id.* at 15) based upon their "intent." *Id.* at 17. As explained above (see pages 13-14, *supra*), however, this is a totally erroneous description of the decision of the Minnesota Supreme Court, which *expressly held that there was no contract under Minnesota law and that the parties "intended [to create] none."* Pet. App. A9 (emphasis added). Once petitioner's mischaracterization of the state-law basis for his claim is corrected, his constitutional argument largely collapses: the issue is not whether First Amendment protection for truthful political speech supersedes his contract right to enforce a promise of confidentiality, but whether First Amendment considerations have *any* role to play in deciding if a state may impose liability on the media under the equitable doctrine of promissory estoppel. That, we submit, is not a fairly debatable issue under this Court's precedents.

[8] Petitioner (Br. 18-19), like the Minnesota Court of Appeals (Pet. App. A33), errs in treating a reporter's promise of confidentiality like a routine commercial arrangement. Our submission here is that promises not to publish truthful and important political information present special First Amendment issues. The trial court correctly recognized this, stating "I understand you are not talking about buying ink for the newspaper." 8/22/88 Tr. 13.

A. The First Amendment Protects The Publication Of Truthful Information About A Political Campaign

The newspapers' disclosure of petitioner's identity in this case was both completely accurate and directly relevant to a matter of the highest public concern—the Minnesota gubernatorial election then six days away. This Court's decisions conclusively establish that the right to publish truthful information regarding an imminent political election lies at the core of the First Amendment's protections. As such, this First Amendment interest is both relevant and entitled to great weight in deciding whether state law may, consistent with the Constitution, hold a newspaper accountable in damages for publishing accurate political information.

Because "the First Amendment's primary aim is the full protection of speech upon issues of public concern," the Court "has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick* v. *Myers*, 461 U.S. 138, 145, 154 (1983) (citation omitted). In particular, "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental

affairs," including "discussions of candidates." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). Indeed, "[t]he free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign," and therefore the First Amendment " 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.' " *Brown* v. *Hartlage*, 456 U.S. 45, 53 (1982) (citation omitted). Because "[v]igorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty," it is a "value [that] must be protected with special vigilance." *Harte-Hanks Communications, Inc.* v. *Connaughton*, 109 S. Ct. 2678, 2695, 2696 (1989).

In addition, this Court consistently has recognized the importance of truthful information in our society. As it recently held, " '[i]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, *absent a need to further a state interest of the highest order*.' " *Florida Star* v. *B.J.F.*, 109 S. Ct. 2603, 2609 (1989) (citation omitted; emphasis added). The compelling constitutional value in the dissemination of truthful information has been found to override a state's interest in preserving the privacy of a rape victim (*Florida Star*; *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975)), protecting the identity of juvenile offenders (*Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977)), maintaining the secrecy of a pending judicial disciplinary inquiry (*Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978)) or a completed grand jury proceeding (*Butterworth* v. *Smith*, 110 S. Ct. 1376 (1990)), and safeguarding an individual from embarrassing publicity (*Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767 (1986)) or intentional infliction of emotional distress (*Hustler Magazine* v. *Falwell*, 485 U.S. 46 (1988)).

Under these decisions, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Butterworth*, 443 U.S. at 102.[9]

Against this background, and in the particular circumstances of this case, the First Amendment interest in publishing petitioner's identity clearly was relevant to the Minnesota Supreme Court's analysis and outweighed petitioner's minimal interest in denying responsibility for his attack on a political opponent.[10] As truthful information of immediate importance to an upcoming political election, it was precisely the sort of information necessary for "voters * * * to inform themselves about the candidates and the campaign issues." *Eu* v. *San Francisco Democratic Comm.*, 489 U.S. 214, 223 (1989). Petitioner's secretive role in the use of decade-old minor charges to attack the DFL ticket, undertaken in his capacity as a Whitney Campaign adviser and in league with others involved in the Whitney Campaign and the I-R party, raised serious issues concerning the integrity of the Campaign and potentially of Wheelock Whitney himself. As Judge Crippen observed, petitioner was "a political operative" involved in "a political scheme to broadcast a political attack but at the same time to avoid responsibility for the act"; he thus "solicited promises from reporters to serve his personal interests, to hide political conduct that others would believe to be shabby." Pet. App. A53, A54, A56. Furthermore, even if reasonable minds might differ over whether petitioner and the other Whitney supporters

---

[9] *Cox Broadcasting* makes clear that civil damages awards, no less than criminal penalties or other governmental sanctions, are subject to this First Amendment standard.

[10] See, *e.g.*, *Butterworth*, 110 S. Ct. at 1380 ("[w]e must thus balance respondent's asserted First Amendment rights against Florida's interests"); *Connick*, 461 U.S. at 148 n.7, 150 ("[t]he inquiry into the protected status of speech is one of law, not fact," and "the courts must reach the most appropriate possible balance of the competing interests").

were engaged in "dirty tricks,"[11] that was for the voters of Minnesota to decide, and disclosure of petitioner as the source of the leaks was highly relevant to their informed decision. See *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 791-792 (1978) ("the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments," and "[t]hey may consider, in making their judgment, the source and credibility of the advocate"); see also *id.* at 792 n.32; *Meese* v. *Keene*, 481 U.S. 465, 480-482 (1987).

What is more, petitioner's identity as the source of the leak was rapidly spreading and could not be held in secrecy in any event. The newspapers had independent confirmation of petitioner's role before they published his name. See pages 6-9, *supra*. In addition, four news organizations were aware of petitioner's identity; a number of people in the Whitney Campaign knew of his involvement, including those who had met with him as well as others whom Ismach had informed; and Flakne's name was on a publicly available sign-out sheet at the courthouse, which provided a key link back to the Campaign and petitioner. See pages 3-6, *supra*. Indeed, petitioner himself had told his employer of the attack on Johnson and his participation in it. Tr. 183-184, 355, 1499-1502. In these circumstances, petitioner had no overriding interest in the reporters' assurances of anonymity, and the publication of this truthful and important political information fell squarely within the shelter of the First Amendment.[12]

[11] The trial record shows that several people regarded the scheme as a dirty trick. Tr. 332-333, 504, 840, 1500-1504. Indeed, petitioner himself recognized that his employer might consider his actions to be "inappropriate." Tr. 353-355; see also Tr. 612.

[12] See, *e.g.*, *Florida Star*, 109 S. Ct. at 2612 (the First Amendment forecloses privacy claims where "liability follows automatically from publication * * * regardless of whether the identity of the victim is already known throughout the community * * * or whether the identity of the victim has otherwise become a reasonable subject of public concern").

Petitioner seeks to avoid this constitutional conclusion on three grounds.[13] First, he suggests (Br. 18-20) that the enforcement of contracts is a compelling state interest that outweighs the First Amendment interest in the publication of truthful political information. Once again, however, petitioner simply ignores the fact that the Minnesota Supreme Court held that *there was no contract under state law*. See pages 13-14, 28-29, *supra*. Moreover, again as a matter of state law, the court held that petitioner did not have a substantial interest in enforcing the assurance of confidentiality and that the absence of a legal remedy would not be unjust. See pages 14-15, 24, *supra*. Finally, petitioner nowhere explains why this asserted state interest is of a higher order under the Constitution than the various state interests in privacy and confidentiality that this Court previously has held insufficient to outweigh the First Amendment, and it is difficult to comprehend how petitioner could have a greater interest in anonymity than does the innocent victim of a brutal rape, an accused juvenile offender who is awaiting trial, or a judge against whom an allegation of judicial misconduct has been made but not yet resolved. See pages 30-31, *supra*.

Second, petitioner asserts that the *Florida Star* line of cases is irrelevant here because the newspapers "unlaw-

[13] Contrary to petitioner's assertion (Br. 12, 18-19, 26), neither *Snepp* v. *United States*, 444 U.S. 507 (1980), nor *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984), suggests that the First Amendment would countenance imposition of liability in the present circumstances. *Snepp* involved national security and a fiduciary obligation of trust, both of which are governmental interests of the highest order. Moreover, *Snepp* did not prohibit or penalize the publication of any information but simply approved a pre-publication review process. Indeed, in light of the vital governmental interests and the limited governmental intrusion, the Court observed that the review process would not have violated the First Amendment even in the absence of the employee's agreement to submit material for clearance. 444 U.S. at 509 n.3, 515 n.11. Likewise irrelevant is *Seattle Times*, which considered limitations on the use of information obtained pursuant to the coercive powers of the courts; that issue has no bearing here.

fully" (Br. 26) and "through intentional wrongdoing" (*id.* at 24) learned that he was the source of the leaked records. Petitioner's premise, however, cannot be squared with the undisputed evidence that the newspapers did nothing unlawful or improper in securing the information they later published. Indeed, the Minnesota Supreme Court explicitly rejected his claim of fraud on the part of either the reporters or the editors. See Pet. App. A7. In light of that ruling, petitioner's only remaining complaint is that *publication* of his identity was wrongful, but that is irrelevant to the question whether the information was "acquired unlawfully" under *Florida Star*.[14] It also avails petitioner nothing to accuse the newspapers (Br. 24-25) of engaging in the "use of lies" and "calculated falsehoods." The decisions of this Court to which petitioner refers involved publications that were *false*, not, as in this case, ones that are true. The newspapers' decision to publish petitioner's name does not transform such articles into "lies" and "falsehoods."[15]

Finally, petitioner urges (Br. 29) that the newspapers should have followed "options" other than the publication of a story that disclosed his name. Such second-guessing, however, is antithetical to the editorial freedom that is protected by the First Amendment. See *FCC* v. *League*

[14] For this reason, petitioner plainly errs in relying (Br. 30) on *Galella* v. *Onassis*, 487 F.2d 986 (2d Cir. 1973), and *Dietemann* v. *Time, Inc.*, 449 F.2d 245 (9th Cir. 1971). In both of those cases, the press engaged in tortious (and even criminal) misconduct in acquiring the materials in question. Here, by contrast, as the decision below conclusively establishes, the newspapers committed no unlawful or wrongful act in receiving the information petitioner offered them.

[15] Given this Court's willingness "to insulate even *demonstrably* false speech from liability" in order to "provide 'breathing space' for true speech on matters of public concern" (*Philadelphia Newspapers*, 475 U.S. at 778 (emphasis in original; citations omitted)), it would be highly ironic if the First Amendment did not afford any protection to the publication of the truthful political information at issue in this case.

of Women Voters, 468 U.S. 364, 375-376 (1984); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256-258 (1974); Powe, *Tornillo*, 1987 SUP. CT. REV. 345.[16] Furthermore, none of the suggested alternatives would have served the paramount First Amendment interest in providing voters all relevant facts about the election. If no story had been published at all, the public would have been denied the information about Marlene Johnson's criminal record, which was a matter of legitimate public concern. See, *e.g.*, *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 300 (1971) ("a charge of criminal conduct against an official or a candidate, no matter how remote in time or place, is always 'relevant to his fitness for office' "); *Garrison* v. *Louisiana*, 379 U.S. 64, 76-77 (1964). Similarly, failure to run an article would have concealed the effort of the Whitney Campaign to discredit Johnson, which itself was important and newsworthy.[17] If, on the other hand, the Johnson story had been published without any mention of the source of the information, the activities of the Whitney Campaign likewise would not have come to light; although that is precisely the result petitioner hoped to accomplish, it is not one that furthers the First

[16] Contrary to petitioner's assertion (Br. 15), *Herbert* v. *Lando*, 441 U.S. 153 (1979), did not eliminate the constitutional protection accorded a newspaper's editorial judgment. Rather, the Court merely held that the editorial process may be relevant to the issue of actual malice under *New York Times Co.* v. *Sullivan* and therefore is not "immune from any inquiry whatsoever." 441 U.S. at 168. The Court's ruling that discovery procedures would not indirectly violate press freedoms has no relevance to the issue presented here of the right of the newspapers to exercise editorial judgment to decide what to print. Indeed, *Herbert* specifically cautioned that "if inquiry into editorial conclusions threatens the suppression not only of information known or strongly suspected to be unreliable but also of truthful information, the issue would be quite different." *Id.* at 172. See also *id.* at 174 ("[t]his is not to say that the editorial discussions or exchanges have no constitutional protection").

[17] Petitioner's expert agreed that the source of the leaked information could have been considered newsworthy. Tr. 735.

Amendment interest in full and candid disclosure to the electorate, especially since Whitney officials were denying that the Campaign had any involvement in disseminating Johnson's records. And in light of the Campaign's denials, a veiled reference to the source—such as a "Republican activist" (Pet. Br. 29)—would have given the public no basis for discerning the truth and would unfairly have implicated a large number of innocent people.

At trial, petitioner's journalism expert, Arnold Ismach,[18] asserted that the newspapers had made "a mistake in judgment that resulted in an unethical act that was unnecessary." Tr. 717; see also Tr. 711. But if the " 'breathing space' " required "for true speech on matters of public concern" means anything (*Philadelphia Newspapers*, 475 U.S. at 778), it is that liability cannot be imposed on the media based on "mistakes in judgment" or hindsight disagreements about what was "necessary" for the public to know. Petitioner's proposed approach is incompatible with fundamental First Amendment values and, because it does not advance a significant (let alone compelling) state interest recognized by state law, it would impermissibly infringe the core right to publish truthful political information.[19]

---

[18] As recounted above (see pages 3-5, *supra*), Ismach was the media consultant to the Whitney Campaign and participated with petitioner in the plan to leak Marlene Johnson's arrest records to the media.

[19] Petitioner's approach also would open up a veritable Pandora's box of intractable problems for the media and the courts. See Denniston, *A Right to Expose Sources?*, WASH. JOURNALISM REV., Nov. 1988, at 18 ("if the Constitution has nothing to say concerning a news organization's editorial choices about the way it deals with sources * * *, the whole range of source-reporter relationships would be subject to unlimited review by judges and juries whenever the source had a complaint that could be translated into a lawsuit"). For example, can a source sue for an unflattering or disparaging article if he asserts that the reporter promised to write a "favorable" article? See *Strick* v. *Superior Court*, 192 Cal.

(Footnote continued on following page)

B. There Is No Conflict Between The Requirements Of The First Amendment And Applicable Principles Of Journalistic Ethics

Attempting to divert attention from the fact that he had no enforceable rights under Minnesota contract or fraud law, petitioner (Br. 16, 24-31), like the dissenting justices below (Pet. App. A14-A18), launches a rhetorical attack on the newspapers' actions as a breach of journalistic ethics. As this Court has recognized, however, evolving standards of journalism do not define the scope of the First Amendment. See *Harte-Hanks Communications*, 109 S. Ct. at 2684-2686.

More importantly, however, petitioner is simply wrong in his appraisal of journalistic ethics. The newspapers' decisions to publish, while difficult and even agonizing, were entirely consistent with ethical standards. Petitioner's covert efforts to attack the DFL ticket in the closing days of the election campaign confronted the newspapers with a moral dilemma in which two journalistic principles—the obligation to fully inform the public, and the responsibility to honor a promise to a source—were

---

[19] *continued*

Rptr. 314, 320 n.5 (Ct. App. 1983). Or can a source bring suit if a reporter promises that he will not "identify" the source, but the article contains sufficient detail that the source believes he is identifiable? See *Ruzicka* v. *Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1291 (D. Minn. 1990); see generally D. Gillmor, J. Barron, T. Simon, & H. Terry, MASS COMMUNICATION LAW 362 (5th ed. 1990) ("Media lawyers see endless possibilities for plaintiffs using a contract approach. Would it be a breach of contract to * * * surprise a source by disparaging his views, or to disappoint a source by playing down statements she assumed would get front-page attention?"). In fact, the lower-court decisions in this case, until reversed by the Minnesota Supreme Court, had encouraged some sources to try "to negotiate in detail how confidential information could be used, and even to demand that the article would be given the slant sought by the source, under the threat of a contract violation suit if they were not satisfied." N.Y. Times, July 21, 1990, at 6, col.4 (summary of statement of Bruce W. Sanford).

placed in conflict. After extensive and conscientious consideration of their responsibilities to petitioner *and* the public, the newspapers reached a reasonable and good-faith resolution of that ethical conflict.

Inherent in petitioner's argument to the contrary is the belief that reporters' promises are *never* to be broken. As the present case shows, however, such an absolutist view ignores the danger that confidential sources may seek to manipulate the press and mislead the public by cloaking their identity in anonymity.[20] Petitioner's rigid and oversimplified theory has no place either in ethics or in law. On the contrary, it is generally recognized that a journalist's promise to a source may properly be disregarded in some circumstances. Pet. App. A7-A8 n.4. In fact, petitioner's own trial expert, Arnold Ismach, conceded that a reporter can—*and should*—divulge confidential information in order to prevent the commission of a serious crime.[21]

In addition to the above example, there are a number of other instances in which responsible journalists have

---

[20] See H. Goodwin, GROPING FOR ETHICS IN JOURNALISM 120, 129 (2d ed. 1987) ("Many journalists are worried about sources using them when they refuse to be identified with the information they pass along. * * * Being used * * * is what bothers journalists about arrangements that restrict their ability to tell the whole story—not just what was said, but who said it and why"); Smyser, *There Are Sources and Then There Are "Sourcerers"*, 5 SOC. RESP.: JOURNALISM, L., MED. 13, 14-15 (1979) ("[A] 'sourcerer' does not usually have the public interest as his or her primary objective" and "his or her purpose is not so much to pass information along to the public through the press * * * [as] it is to use the press, and ultimately the public, as a means to an end. * * * And because their motivation is something other than a desire for an informed public, too many times what they induce reporters and editors to plant with the public is not so much information as it is propaganda or, not infrequently, misinformation").

[21] See Tr. 743-744. Other witnesses at trial agreed that a promise of confidentiality is not absolute in all situations. Tr. 915-916, 1179-1180, 1221-1224, 1274-1275, 1329.

concluded that a promise to a source should be breached *to protect the broader public interest*:

- During the Iran-Contra hearings, Colonel Oliver North accused Congress of leaking secret intelligence information relating to the *Achille Lauro* hijacking. In fact, North himself had been the confidential source of those leaks. Despite its promise of confidentiality, *Newsweek* ran an article stating that "the colonel did not mention that details of the interception, first published in a *Newsweek* cover story, were leaked by none other than North himself." NEWSWEEK, July 27, 1987, at 16; Pet. App. A8 n.4.
- A *Washington Post* reporter interviewed presidential candidate Jesse Jackson on the condition that Jackson not be identified. Jackson then used derogatory ethnic characterizations of Jews and stated his view that they were unduly preoccupied with Israel. Despite the promise of confidential treatment, the reporter wrote that "[i]n private conversations with reporters, Jackson has referred to Jews as 'Hymie' and to New York as 'Hymietown.' " The reporter defended his action because Jackson "was presenting himself for the highest elective office in this land" and "he had said something that appeared to at least stereotype if not * * * denigrate a group of American electors. That statement ought to be brought to the public's attention." H. Goodwin, GROPING FOR ETHICS IN JOURNALISM 126-127 (2d ed. 1987).
- During the 1988 Democratic presidential primary campaign, a confidential source released a videotape showing that Senator Joseph Biden had plagiarized a speech of British politician Neil Kinnock. Notwithstanding a promise of confidentiality, the *New York Times* disclosed that the tape had not come from the Gephardt campaign, which had the practical effect of revealing that the source was the Dukakis campaign. As a result, John Sasso, Dukakis's campaign manager, was identified as the source and fired from the campaign. Tr. 747-750, 1320-1322, 1377-1379, 1381-1382, 1384; Langley & Levine, *Broken Promises*, COLUM. JOURNALISM REV., July/Aug. 1988, at 21, 22.

- Jody Powell, President Carter's press secretary, leaked information to a *Chicago Sun Times* reporter that Senator Charles Percy had accepted questionable favors from the Bell and Howell Company. At the time, Percy had been sharply critical of Bert Lance, the President's budget director and adviser, and Powell provided the information on the understanding that its source would not be identified. After investigating the story and finding it to be entirely false, the reporter ran an article stating that top White House aides were trying to smear a Senator because of his involvement in the Lance probe. Smyser, *There Are Sources and Then There Are "Sourcerers"*, 5 SOC. RESP.: JOURNALISM, L., MED. 13, 17-18 (1979).
- A *Philadelphia Inquirer* editorial writer talked to a University of Pennsylvania student about the attempted assassination of President Reagan in 1981. The discussion was "off the record," *i.e.*, on the condition that it not be published, and the student stated that he thought " 'President Reagan should be killed.' " The writer recounted the conversation in his article despite the off-the-record agreement, explaining that he violated "this man's trust" because "I owe more allegiance to the president and the country than to people who hide behind the very freedoms we value, in order to express ideas that threaten us all." Goodwin, *supra*, at 125.[22]

[22] In addition, Joan Konner, the Dean of the Graduate School of Journalism at Columbia University, has written that "[a]t the risk of offending some journalism fundamentalists, I'd like to question one of the pieties and absolutes of the trade: the inviolability of sources. * * * The question * * * is more ethical than legal, and sometimes principles come into conflict and we break our promises and our confidences to serve what we deem to be a more important purpose." NEWSDAY, Dec. 11, 1989, at 47. Similarly, the code of the Radio-Television News Directors Association recognizes "the journalist's ethic of protection of confidential information and sources" and urges the "unswerving observation of it *except in instances in which it would clearly and unmistakably defy the public interest.*" Goodwin, *supra*, at 373 (emphasis added). And in a recent American Society of Newspaper Executives survey of

(Footnote continued on following page)

These illustrations provide a compelling demonstration of what common sense teaches in any event: a reporter's promise is not absolute. Petitioner's one-dimensional approach—which focuses exclusively on the existence of the promise and excludes all consideration of the *public* interest—simply cannot stand.

This is not to suggest, of course, that promises to sources should ever be lightly overridden. But there is no realistic danger of that happening, as is evident from the fact that promises have been breached only in the rarest and most compelling circumstances. Journalists recognize and take with utmost seriousness their obligation to honor promises. What is more, journalists have a critical interest in the continued availability of confidential sources, which could be jeopardized if promises routinely are broken and prospective sources come to doubt the integrity and good faith of the press. See, *e.g.*, Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement*, 73 MINN. L. REV. 1553, 1564-1565, 1569 (1989). For those reasons, the risk of breach is an inherently self-limiting problem that will seldom arise in practice.

Seizing on the First Amendment interest in confidential sources, petitioner argues (Br. 7-10, 27-29) that constitutional values would be disserved rather than furthered by allowing publication of truthful and newsworthy information in violation of a promise of confidentiality. As just discussed, that conclusion does not follow from the premise. But more to the point, the required balancing of competing journalistic interests should be the responsibility

[22] *continued*
journalistic ethics, publishers, editors, and staff members broadly agreed that a pledge of confidentiality "should always be taken seriously" but "can be violated in unusual circumstances." P. Meyer, ETHICAL JOURNALISM 209 (1987).

of journalists, not private plaintiffs and the courts. Journalists have both the incentive and expertise required to assure a free flow of information, and, as a practical matter, ethical standards governing their relationship with sources "cannot be legislated." *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 256 (1974). In the end, it is

> more important that the government be kept out of the business of penalizing the publication of news, including a source's identity, than that confidential sources be compensated for damages suffered as the result of a reporter's broken promise.

Langley & Levine, *Broken Promises*, COLUM. JOURNALISM REV., July/Aug. 1988, at 21, 24.

As the record reflects, this case has been the subject of "considerable debate in the journalistic community," and knowledgeable and thoughtful observers "have come down on all sides of the issue." Tr. 499. Whatever the final results of the journalistic debate, the very existence of such a debatable issue proves the wisdom of the Minnesota Supreme Court's decision to treat this case as an ethical rather than a legal matter.[23] By holding that the promises of confidentiality were not legally enforceable in this case, the court below reached a wise resolution of a difficult issue, and nothing in its conclusion conflicts with the First Amendment.

[23] See D. Gillmor, J. Barron, T. Simon, & H. Terry, MASS COMMUNICATION LAW 394 (5th ed. 1990) ("[g]enerally, a broken promise by a reporter raises an ethical question but provides no legal cause of action"; the now-reversed decision of the Minnesota Court of Appeals in this case "alone suggests otherwise"); Langley & Levine, *supra*, COLUM. JOURNALISM REV. at 24 ("[e]thical, not legal, considerations should determine whether a journalist, once having promised confidentiality, should go back on his word").

C. A State-Court Damages Award To Enforce A State-Created Legal Obligation Constitutes State Action

In a further effort to evade the policies of the First Amendment, petitioner contends (Br. 14-17) that the First Amendment is simply irrelevant here because there is no "state action." In his view, the Minnesota Supreme Court's opinion "disregarded the difference between governmental coercion and private voluntary conduct." *Id.* at 15.

We note first that this issue was not properly raised in the petition for certiorari. The Question Presented concerned the substantive content rather than the applicability of the First Amendment, and not a word in the petition refers to the issue of state action. Having failed to include it in his petition, petitioner cannot now interject this issue in his brief on the merits.[24]

In any event, by framing his argument in terms of "contract law" (Br. 15, 16), petitioner once again misstates the question presented. The question here is not, as petitioner would have it, whether state action arises when a court is asked to enforce a legal obligation voluntarily undertaken by private parties.[25] Because the Minnesota Supreme Court held that there was no contract under state law, the only possible basis for the newspapers' potential liability is promissory estoppel. That doctrine, however, does not involve a voluntarily assumed legal duty but rather creates an obligation "implie[d] * * * in law where none exists in fact." Pet. App. A10.

[24] Moreover, as explained above (see page 23, *supra*), the Minnesota Supreme Court did not address the state action issue.

[25] Even in that situation, judicial enforcement of a private contract is sufficient to constitute state action. See *Railway Employes' Dept.* v. *Hanson*, 351 U.S. 225, 232 n.4 (1956) ("[o]nce courts enforce the agreement the sanction of government is, of course, put behind them"); *Barrows* v. *Jackson*, 346 U.S. 249, 254 (1953); *Shelley* v. *Kraemer*, 334 U.S. 1, 18, 20 (1948).

In this case, therefore, the role of state law is two-fold. First, it establishes a legal rule that implies an obligation that was not voluntarily formed or accepted between the parties. Second, it provides a judicial mechanism for enforcing that legally created obligation, thereby backing the duty with the coercive authority of government.

Once the state action issue is correctly formulated, this case becomes indistinguishable from *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). There, the Court held that judicial enforcement of a cause of action for defamation constitutes state action. The Alabama Supreme Court had reasoned, as petitioner argues here, that "[t]he Fourteenth Amendment is directed against State action and not private action." *Id.* at 265. The Court rejected that reasoning in language that is equally applicable to the present case:

> That proposition has no application to this case. Although this is a civil lawsuit between private parties, the *Alabama courts have applied a state rule of law* which [defendants] claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only * * *. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Ibid. (emphasis added). This Court consistently has adhered to the state action holding of *New York Times*. See, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 916 n.51 (1982) (emphasis added) ("[a]lthough this is a civil lawsuit between private parties, *the application of state rules of law by the Mississippi state courts* in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment"); *Philadelphia Newspapers*, 475 U.S. at 777.

This settled principle is controlling here. As in *New York Times*, state law in this case provides both the governing rule of law and the legal enforcement mechanism. This is ample state action to bring the First Amendment into play. See *Ruzicka* v. *Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1295 (D. Minn. 1990); *Virelli* v. *Goodson-Todman Enterprises*, 536 N.Y.S.2d 571, 576 (App. Div. 1989), subsequent opinion, 558 N.Y.S.2d 314 (1990).

Petitioner's only response is that the law of contracts in this case, unlike the law of defamation in *New York Times*, rests on a voluntary agreement between the parties and is neutral with respect to First Amendment values because it is not designed to curtail speech. These objections are insubstantial. As the Minnesota Supreme Court held, no contract existed here, and the newspapers no more voluntarily agreed to pay money to petitioner if they published an article disclosing his name than the *New York Times* voluntarily assumed an obligation to pay Sullivan if it published statements unflattering to him. In both cases, the plaintiff is asking a court to require the newspaper to compensate him for violation of a legal duty created by operation of state law, not one voluntarily assumed by the parties.

Moreover, the asserted neutrality of contract law to First Amendment rights is irrelevant. While most such disputes will not raise any First Amendment issue, state law can be unconstitutional as applied in a given case, and promissory estoppel law is not exempt from constitutional scrutiny where, as here, it would impinge on freedom of the press. Petitioner's argument is just as applicable to the cause of action for malicious interference in *Claiborne Hardware* or the claim for intentional infliction of emotional distress in *Falwell*. While those actions normally do not implicate the First Amendment, they are subject to constitutional review when they do, and the same is true of the promissory estoppel theory in this case.

D. The Reporters' Promises Of Confidentiality Did Not Waive The First Amendment Rights Of The Newspapers And The Public

Petitioner also asserts (Br. 20-22) that, even if the First Amendment applies in this case and would otherwise be violated, the reporters' promises of confidentiality waived the newspapers' First Amendment rights.[26] This assertion of waiver is unfounded.[27]

Petitioner's claim simply begs the question before the Court. The First Amendment question in this case is whether the newspapers have a First Amendment right to publish petitioner's name *notwithstanding* the reporters' promises of confidentiality. The existence of the promise thus is an essential part of the question presented but does not provide the answer; it states rather than resolves the issue. Accordingly, the reporters' promises of anonymity are not and cannot be a waiver of the First Amendment right claimed by the newspapers to publish petitioner's name despite the reporters' promises.

In addition, petitioner's argument does not meet the strict standard applicable to a purported waiver of constitutional rights. Two overarching considerations inform the proper analysis of the waiver issue here. First, the asserted waiver involves not just the newspapers' right to publish but also the public's (and in this case the voters') right to know. This latter right is itself entitled to constitutional protection. See, *e.g.*, *Eu*, 489 U.S. at 223; *CBS, Inc.* v. *FCC*, 453 U.S. 367, 395-396 (1981); *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U.S.

---

[26] The waiver issue was not considered by the Minnesota Supreme Court. See page 23 note 6, *supra*.

[27] The issue of the waiver of federal constitutional rights is itself a question of federal constitutional law. See, *e.g.*, *Brewer* v. *Williams*, 430 U.S. 387, 397 n.4 (1977); *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966).

748, 756-757 & n.15 (1976). Given the trilateral interests involved, the Court should be hesitant to find that a bilateral reporter-source promise waives the public's right to receive truthful political information.

Furthermore, a reporter cannot exercise or relinquish a newspaper's First Amendment rights alone; rather, reporters share that responsibility with the publisher, editors, and other reporters. The collaborative editorial process is an integral feature of journalism and is essential to the press's performance of its role. While we do not ask this Court to hold that a reporter cannot bind the paper under state promissory estoppel law,[28] consideration of the effective functioning of the editorial process protected by the First Amendment requires caution in allowing individual reporters to forfeit the free press rights of the entire organization.

In fact, in October 1982, the Pioneer Press Dispatch had in place a written policy directing reporters not to grant confidentiality to a source without first checking with an editor. Tr. 662, 1425-1427.[29] At trial, David Hall explained that one of the reasons he decided to disclose petitioner's identity was the reporter's failure to obtain approval before promising confidentiality. Tr. 1440. Moreover, apart from any requirement of prior approval, it generally is recognized that the final decision whether to identify a confidential source rests with the editor rather than the

---

[28] But see *Froelich* v. *Aspenal, Inc.*, 369 N.W.2d 37, 39 (Minn. Ct. App. 1985) ("[promissory e]stoppel cannot be posited on the claimed actions of an agent"). Because the Minnesota Supreme Court raised the promissory estoppel issue *sua sponte* in its opinion, respondents did not have an opportunity to be heard on the agency question.

[29] Other newspapers have adopted similar policies. See Langley & Levine, *supra*, COLUM. JOURNALISM REV. at 22; Goodwin, *supra*, at 132 (*Detroit Free Press* policy); Washington Post, June 13, 1988, at A4, col. 2 (*Newsday* policy).

reporter. Tr. 652, 656, 1140, 1394-1395, 1490, 1493; D. Gillmor, J. Barron, T. Simon, & H. Terry, MASS COMMUNICATION LAW 361 (5th ed. 1990) ("[a]pproval of and review by editors of reporters' use of confidential sources has since become routine").[30]

Especially against this background, the requirements for waiver of a constitutional right must be exacting, as this Court has recognized. In civil as in criminal cases, the Court has applied a constitutional standard that requires a waiver to be "voluntary, knowing, and intelligently made" and represent " 'an intentional relinquishment or abandonment of a known right or privilege' " with "full awareness of the legal consequences." *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 185-187 (1972) (citation omitted). "In the civil area, the Court has said that '[w]e do not presume acquiescence in the loss of fundamental rights' " but instead must " 'indulge every reasonable presumption against waiver.' " *Fuentes* v. *Shevin*, 407 U.S. 67, 94 n.31 (1972) (citations omitted). And, witn particular regard to the First Amendment, the Court has been "unwilling to find waiver in circumstances which fall short of being clear and compelling." *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 145 (1967). See *Ruzicka*, 733 F. Supp. at 1296-1298.

Applying these principles, it is clear that the reporters' promises—which did not even constitute a binding contract—did not waive the newspapers' First Amendment rights. At the time of their dealings with petitioner, the reporters lacked sufficient information to make a knowing and intelligent waiver. Although they were aware of

[30] See also *Poteet* v. *Roswell Daily Record, Inc.*, 584 P.2d 1310, 1312-1313 (N.M. Ct. App. 1978) (A reporter's promise of confidentiality "was insufficient to show waiver without raising the additional requirement of the reporter's authority to speak for the defendant. * * * Absent authority, the statements of the reporter could not be considered as a waiver of a constitutional privilege by the defendant newspaper").

petitioner's background and political history, they did not know, for example, that he was approaching them in his capacity as a Whitney Campaign adviser. Nor did they know the nature of the information he was offering to provide in exchange for their pledge of confidentiality, including specifically the public availability of the criminal records he possessed and the obsolete and minor character of the charges involved. Nor, for that matter, did they know that petitioner's overtures were part of a broader scheme by members of the Whitney Campaign to discredit the DFL ticket. Given the purpose of the leak, petitioner deliberately kept the reporters in the dark and failed to reveal information that would be material to an informed and conscientious waiver decision.

It also is significant that the editors decided to publish petitioner's name "in the larger context of the news" (Pet. App. A9) on the basis of additional information that was not known to the reporters. In particular, petitioner's identity had been confirmed through independent sources, and the Whitney Campaign was publicly denying any involvement in the attack on Johnson. Even if the reporters' promises amounted to a waiver in the circumstances in which they were made, they should not bind the newspapers from later setting the public record straight based on information gathered apart from petitioner's original discussions.

CONCLUSION

The writ of certiorari should be dismissed. In the alternative, the judgment of the Supreme Court of Minnesota should be affirmed.

Respectfully submitted.

PAUL R. HANNAH
LAURIE A. ZENNER
Hannah & Zenner
1122 Pioneer Building
336 Robert Street
St. Paul, Minnesota 55101
(612) 223-5525

STEPHEN M. SHAPIRO
Counsel of Record
ANDREW L. FREY
KENNETH S. GELLER
MARK I. LEVY
MICHAEL W. McCONNELL
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

JOHN C. FONTAINE
CRISTINA L. MENDOZA
Knight-Ridder, Inc.
One Herald Plaza
Miami, Florida 33132
(305) 376-3800

Counsel for Respondent
Northwest Publications, Inc.

FEBRUARY 1991

No. 90-634

IN THE

Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MINNESOTA

REPLY BRIEF OF PETITIONER

Elliot C. Rothenberg
3901 West 25th Street
Minneapolis, MN 55416
(612) 926-8185
Counsel for Petitioner

1991 — Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411 — 588-7506

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1990

No. 90-634

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF MINNESOTA

REPLY BRIEF OF PETITIONER

ARGUMENT

I.

RESPONDENTS HAVE NOT JUSTIFIED DISMISSAL OF THE COURT'S GRANT OF CERTIORARI.

Cowles Media counsel Mr. Borger told the Minnesota Supreme Court, "The central error which permeates this entire case is that the court below perceived no constitutional dimension to the case." J.A. 15. In all courts below, re-

spondents have argued that "any state-imposed sanction in this case violates their constitutional rights of a free press and free speech." A-11-12. In a statement issued after the decision below, Star Tribune executive editor Joel R. Kramer said, "We are especially pleased that the court has ruled that the decision to publish true facts relating to the activities of a 'political source in a political campaign' is one that is protected by the First Amendment." New York Times, July 21, 1990, at 6, col. 4, cited by respondent Northwest Publications, brief at 37.

Now, however, both respondents repeat claims made in their briefs opposing the petition for certiorari that the opinion below was based on state law and not the Constitution. Despite their claims, they have not given the Court reason to hold that its grant of certiorari was improvident.

This Court has jurisdiction in this case because the Minnesota Supreme Court held that its decision was required by the First Amendment and not merely by state law. After first holding that a conventional contract did not exist, the court below then pointed out that respondents' promises could constitute a legally enforceable implied contract under the doctrine of promissory estoppel. Under Minnesota law, promissory estoppel is a principle of contract law and is based on the RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). *Grouse v. Group Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981); A-11 n.5. A later Minnesota Supreme Court decision held that *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740 (Minn. 1983), cited below at A-10, "augmented the contract approach to include the closely related doctrine of promissory estoppel." *AFSCME Councils 6, 14, 65 and 96 v. Sundquist*, 338 N.W.2d 560, 566

(Minn. 1983). *Christensen* held for its plaintiff on the grounds of promissory estoppel even though he based his pleadings and arguments on violation of his contract without specific reference to promissory estoppel. 331 N.W.2d at 743, 745.

Christensen also emphasized that "promises rendered binding through estoppel are entitled to the normal enforcement remedies of general contract law." 331 N.W.2d at 750. Mr. Cohen's award of compensatory damages upheld by the Minnesota Court of Appeals also would be appropriate for the violation of a contract implied through promissory estoppel.

Despite Mr. Cohen's injuries from reliance upon respondents' promises, the court below regarded itself as bound by the First Amendment in determining that respondents would not be liable in an implied contract with Mr. Cohen. Its constitutional analysis began by observing that

> we have not up to now had to consider First Amendment implications. But now we must. Under a promissory estoppel analysis there can be no neutrality towards the First Amendment. In deciding whether it would be unjust not to enforce the promise, the court must necessarily weigh the same considerations that are weighed for whether the First Amendment has been violated. The court must balance the constitutional rights of a free press against the common law interest in protecting a promise of anonymity. A-12-13.

The Minnesota Supreme Court then held, "Of critical significance in this case, we think, is the fact that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our demo-

cratic society, namely, a political source involved in a political campaign." A-13.

Finally, the opinion below specifically held that Mr. Cohen could not recover in this case because of the First Amendment. "We conclude that in this case enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights." A-13-14.

In the course of its reasoning, the opinion below cited seven decisions of this Court and one Court of Appeals case interpreting the First Amendment. A-12, n.6 and 7, A-13-14.

Still, as in its brief in opposition to the petition for certiorari, respondent Northwest Publications, at 24, claims that the Minnesota Supreme Court's holdings on promissory estoppel and the First Amendment are dicta because the promissory estoppel issue was not previously argued. Regardless, it is irrelevant whether or not a party argued an issue below when the state court actually considered and decided it. *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979). There can be no question as to the proper presentation of a federal claim when the highest state court passes on it. *Raley v. Ohio*, 360 U.S. 423, 436 (1959). None of these cases even suggested that this longstanding practice "carries constitutional overtones," as claimed by respondent Cowles Media Co., brief at 13-14.

Having granted certiorari, the Court has no reason now to regard its order as improvident or to remand the case for clarification. Unlike *Capital Cities Media, Inc. v. Toole*, 466 U.S. 378 (1984), which involved a state court order unaccompanied by reasons, the grounds for the Minnesota Supreme Court's decision were explicitly stated in its opinion. Respondents have not shown that the full record of this case requires a reversal of the certiorari granted on the basis of the opinion below. On the contrary, the record demonstrates the newspapers' emphasis of First Amendment issues from their initial answers through their oral arguments before the Minnesota Supreme Court.

The decision of the Minnesota Court of Appeals held that the First Amendment did not protect respondents' violations of their promises to Mr. Cohen because of the absence of state action and because respondents waived any First Amendment claims. A-28-31, A-35-37. In concluding that enforcement of respondents' promises would violate their First Amendment rights, the opinion below did not even address the issues of state action and waiver. Its failure to consider such important First Amendment issues, far from warranting a reversal of the grant of certiorari as claimed by respondent Northwest Publications (brief at 23), only confirms that the opinion below erred in its constitutional analysis.

II.

RESPONDENTS' AND AMICI'S BRIEFS CONTAIN SEVERAL MISSTATEMENTS OF FACT.

Respondents' and amici's briefs have important factual errors. First, amici claimed repeatedly (brief at 7, 18, 19) that Mr. Cohen was "attempting to use the media to disseminate misleading information" to "smear" a candidate. Respondent Northwest Publications, brief at 32, accused him of engaging in a "dirty trick."

However, all that Mr. Cohen provided respondents, after receiving their promises of confidentiality, were authentic

copies of public court records. A-3. Neither the St. Paul Pioneer Press reporter nor its editors made any such accusations against Mr. Cohen at the time of their transaction with him. Instead, as discussed in petitioner's brief at 6, the newspaper's editors in an editorial said that the documents were relevant and provided the public with information it deserved to know. The editorial took the position that the source was irrelevant and said that the candidate and her campaign should have "informed the public themselves earlier and confronted the issue squarely." Pl.Ex. 29, R. 218-19.

Their brief notwithstanding, the only Northwest Publications employee at the trial to use the phrase "dirty trick" was its past executive editor and current vice president, John Finnegan, who used it not to criticize Mr. Cohen but to condemn the violation of a journalistic promise of confidentiality. Pl.Ex. 76, R. 1590-91, petitioner's brief at 9.

Northwest Publications' assertion, brief at 32, that it "had independent confirmation of petitioner's role" before it published his name has no support whatsoever in the record. Neither executive editor David Hall nor reporter Bill Salisbury nor any other editor or reporter of the Pioneer Press made any such claim in their testimony.[1]

[1]Far from confirming that petitioner was the source of the documents, as claimed by the Northwest Publications brief at 9, the Whitney campaign director actually told the Pioneer Press that he knew nothing of Mr. Cohen's involvement. R. 1437. After being informed of their reporter's promise of confidentiality to Mr. Cohen, Star Tribune editors, independently of the Pioneer Press, assigned a reporter, David Anderson, to "follow up on the story" and to contact members of the gubernatorial campaigns. A-23-24. (Mr. Anderson, was the author of the book on investigative reporting discussed in petitioner's brief at 30). Cowles Media, brief at 5, claimed that Mr. Anderson contacted campaign worker Gary Flakne who allegedly said that he had obtained the court documents for Mr. Cohen. Mr. Flakne, however, testified that Mr. Cohen did not ask him to pick up these records, and he denied telling this to Mr. Anderson or even talking with him. R. 1595-97. Mr. Cohen testified that he did not even know of the existence of the documents when Mr. Flakne signed out the records. R. 147. Mr. Anderson's account of the alleged conversation with Mr. Flakne was never published and Lori Sturdevant, who wrote the Star Tribune article identifying Mr. Cohen, did not agree that others had identified Mr. Cohen. R. 1616-17, 1647. The jury should be deemed to have resolved this factual dispute in Mr. Cohen's favor. Although the Minnesota Supreme Court mentioned the alleged Flakne comment to the Star Tribune (A-4), the opinion below made no reference to it in its discussions of the legal issues of fraud, contract, or implied contract and the First Amendment.

As pointed out in petitioner's brief at 4, Pioneer Press executive editor David Hall quickly decided to disclose Mr. Cohen's identity after learning of his reporter's promise. His testimony does not support the Northwest Publications claim, brief at 37, that his decision was "difficult and even agonizing," as demonstrated by the following response to a question from his own attorney.

> Q. Mr. Hall, would you please tell us why it is you chose not to identify Mr. Cohen in some other way without using his name?
> A. Honestly, I don't think that we ever considered doing it another way other than using his name. If we did, if we did talk about that, I don't recollect it. R. 1440.

The Minnesota Court of Appeals also found that Northwest Publication editors "did not engage in involved deliberations before deciding to disclose Cohen's identity." A-25.

Respondent Cowles Media Co., brief at 34-35, erroneously claims that the jury awarded Mr. Cohen damages for "injury to reputation, humiliation and embarrassment." In fact, the jury awarded nothing for such injuries. The trial court specifically instructed the jury that damages for emotional distress were not recoverable in this case. R. 1859. Mr. Cohen was fired from his job the day the newspaper articles identifying him — and in the Star Tribune's case his employer as well — were published, a fact respondents did not dispute in the Minnesota appellate courts. A-6, A-26.

The Minnesota Court of Appeals held that the loss of Mr. Cohen's employment was a reasonably foreseeable consequence of the dishonoring of respondents' promises to him. A-43. The jury in its special verdict awarded compensatory damages in an amount of $200,000 to "fairly and adequately compensate the plaintiff Dan Cohen for his loss." A-75. An expert witness testified that Mr. Cohen's financial losses resulting from respondents' wrongful conduct exceeded $725,000. R. 1115.

III.

THERE IS NO STATE ACTION IN HOLDING RESPONDENTS LIABLE FOR DAMAGES CAUSED BY VIOLATING VOLUNTARY PROMISES.

Respondents do not dispute that there was no governmental coercion or any other state involvement in their voluntary promises to Mr. Cohen in exchange for desired information. They claim, however, that holding them liable for damages caused by the violation of their voluntary agreements constitutes state action invoking their putative rights under the First Amendment. Previous decisions of this Court do not support the assertion that a party may thus seek refuge from the violations of its own voluntary promises. Contrary to the present case, the cases cited by respondents involved attempts by *third persons* either to seek judicial enforcement of restrictive covenants or to enjoin the application of a labor agreement against the wishes of those who were the actual parties to the respective agreements at issue in those actions. See *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956).[2]

[2]Contrary to Northwest Publications' claim (brief at 43), petitioner raised the state action issue at the beginning of the First Amendment discussion in his petition for certiorari, at 12, and referred the Court to the specific pages in which the Minnesota Court of Appeals held that there was no state action (A-28-31).

IV.

RESPONDENTS WAIVED THE ASSERTION OF FIRST AMENDMENT CLAIMS.

Respondent Cowles Media, brief at 18, claimed that its journalists did not regard the promise of confidentiality as creating an obligation to Mr. Cohen. On the contrary, its reporter, Lori Sturdevant, believed that identifying Mr. Cohen violated the promise she had made to him. R. 1647. She objected so strongly to the decision to dishonor her promise that she refused to allow her name to be used on the Star Tribune article identifying Mr. Cohen. R. 452; J.A. 1. Moreover, Star Tribune editors also indicated that her promise to Mr. Cohen imposed obligations upon the newspaper. These editors instructed Ms. Sturdevant to ask Mr. Cohen to release the Star Tribune from what managing editor Frank Wright, who was ultimately responsible for the decision to identify the petitioner (Cowles brief at 6), testified was "this agreement." Ms. Sturdevant made this request to Mr. Cohen two or three times in repeated telephone calls, but each time he refused to release the Star Tribune from its agreement with him. A-24, R. 1490.

Respondent Northwest Publications, brief at 47, claimed that it did not waive the assertion of First Amendment claims on the grounds of an alleged internal policy of its newspaper requiring reporter promises of confidentiality to be approved by an editor. However, its reporter, Mr. Salisbury, testified that reporters rather than editors deal with the public to gather information and that, regardless of whatever written policies may exist, grants of confidentiality are made by reporters without involvement by editors. R.

417, 423-24. Ms. Sturdevant also testified that she had the authority to promise confidentiality to sources of information without first securing the approval of Star Tribune editors. R. 449, 451-52. Neither the jury nor any court below found that the reporters' promises to Mr. Cohen were unauthorized by their newspapers.

As pointed out by respondent Northwest Publications, brief at 5, and the Minnesota Court of Appeals, A-22, Mr. Cohen first contacted both newspaper reporters by telephone on October 27, 1982, before meeting with them separately later in the day. In the telephone conversations, Mr. Cohen told each reporter that he would give him or her material which may relate to the election if "we can reach an agreement as to the basis on which I would provide this information to you." In the time between the telephone call and the meetings in their offices, the reporters had ample opportunity to contact their editors regarding a prospective agreement with Mr. Cohen.

Respondent Northwest Publications, brief at 46-47, also claimed that a promise of confidentiality to a source does not waive an asserted right to publish his name because holding journalists to their promises allegedly would infringe the public's right to know. However, the Pioneer Press' own employees, Mr. Salisbury and former executive editor Mr. Finnegan, testified that exposing sources promised confidentiality would discourage other potential sources from providing information and would seriously impair the flow of news to the public. Moreover, both respondents argued to the Minnesota Legislature that the "public's right to know" required adoption of the Minnesota Free Flow of Information Act to protect journalists' promises of confidentiality. See petitioner's brief at 8-10, 27-29; A-18 n.1.[3]

V.

NEWSPAPER PROMISES TO SOURCES OF INFORMATION SHOULD BE SUBJECT TO LAWS OF GENERAL APPLICABILITY.

Amici, brief at 8-9, admit that the First Amendment does not grant newspapers immunity from general laws concerning their commercial agreements. Without addressing the First Amendment holdings of *Employment Div., Dept. of Human Resources v. Smith*, 110 S.Ct. 1595 (1990), petitioner's brief at 23-24, amici claim an exemption for agreements made to gather news.

Despite amici's claims, the First Amendment does not justify a distinction between general commercial agreements and agreements with sources of information. Newspapers do not have a special privilege of access to information. They have no First Amendment right to compel private persons to supply information. *Houchins v. KQED, Inc.*, 438 U.S. 1, 10-11 (1978). To obtain much of the news, the press must promise confidentiality to sources of information.

The competitive pursuit of information is integral to the business operations of newspapers. Journalism School Dean Arnold Ismach testified that media organizations "are in the business of acquiring information. That is their trade." R. 694. The trial court found that the relationship between journalist and source of information is a commercial one;

---

[3]Respondent Cowles Media, brief at 18, claimed that the Minnesota Court of Appeals' holding and analysis of the issue of waiver, A-35-37, is not properly before the Court because it was first raised in a brief before that court. However, as discussed previously, it is irrelevant when a federal question was raised in a court below when the question was actually considered and decided. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979).

the Minnesota Court of Appeals held that newspapers should no more be exempt from the law for violating promises to sources than for violating commercial agreements for other goods and services. A-66, A-33.

VI.

THE FIRST AMENDMENT DOES NOT PROTECT RESPONDENTS FROM THE CONSEQUENCES OF VIOLATING PROMISES.

Respondents refuse to acknowledge any obligation, apart from their own discretion, to honor promises they voluntarily make to procure information. Indeed, respondent Northwest Publications, brief at 34, asserts that "the newspapers did nothing unlawful or improper in securing the information" from Mr. Cohen through dishonored promises. Contrary to respondents' claims, there are important state and First Amendment interests in enforcing voluntary promises.

A. The Minnesota Supreme Court and Legislature have recognized important state interests in enforcing voluntary promises.

The opinion below recognized an important state interest in enforcing voluntary promises which in some cases could even overcome what it regarded as First Amendment rights. It pointed out that the doctrine of promissory estoppel, to imply contracts where promises induce action by promisees, is "well-established in this state." A-10. At the beginning of its consideration of First Amendment issues, the opinion below again recognized a state and common law interest in enforcing voluntary promises against which must be balanced perceived "constitutional rights of a free press." A-13. After it concluded that enforcement of respondents'

promises in this case would violate their First Amendment rights, the Minnesota Supreme Court declared that in other instances the state's interest in enforcing promises to sources may outweigh First Amendment considerations. A-14.

In fact, the Minnesota Legislature, in adopting the Minnesota Free Flow of Information Act, Minn. Stat. § 595.022, has determined that there is a special state interest in protecting promises of confidentiality to sources to promote the free flow of information to the public. See petitioner's brief at 10, 29; A-35.[4]

Another recent Minnesota Supreme Court decision recognized a state concern for honesty in dealing with others. In rejecting a proposed interpretation of a statute dealing with the tobacco industry, that court held that "we would have to assume that Congress intended the Act to be a license to lie, an assumption both uncharitable to Congress and violative of this state's deep concern for honesty as well as health." *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 662 (1989).

B. There is no overriding First Amendment interest in allowing newspapers to injure others by dishonoring their voluntary promises.

As pointed out in petitioner's brief at 26-27, newspapers do not have an unlimited right to publish truthful information. Several other cases cited by respondents also limited First Amendment protection to the lawful acquisition of information. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978); *Cox Broadcasting Corp. v.*

[4]In the *Jamieson* case referred to by respondent Cowles Media Co., brief at 38, a Minnesota trial court held that the Minnesota Free Flow of Information Act did not protect sources who defame others. Joint Minnesota Supreme Court appendix at A-570. Mr. Cohen, in contrast, merely supplied authentic copies of public court records.

Cohn, 420 U.S. 469, 496, 497 n.27 (1975); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311 (1977); *Butterworth v. Smith*, 110 S.Ct. 1376, 1381 (1990).

The requirement that punishment for the publication of truthful information must further a state interest of the highest order only applies in cases where the information was lawfully obtained. *Butterworth v. Smith*, 110 S.Ct. 1376, 1381 (1990). *Butterworth* stressed that its holding was limited to a journalist's right to divulge information in his possession before testifying to a grand jury and did not deal with his right to publish information which he obtained as a result of his participation in the proceedings of the grand jury. *Id.*

According to respondent Cowles Media Co., brief at 30 n.7, information obtained through violating state laws against theft would be "not lawfully acquired." Information procured by violating contracts implied through a state's law of promissory estoppel similarly should be regarded as unlawfully acquired. As pointed out in petitioner's brief at 24-25, no constitutional protection exists for lies in the form of defamation or the deliberate violation of promises. Instead, the Court has placed a high value on protecting expectations based upon promises. See petitioner's brief at 19.

The testimony of Mr. Finnegan[5] and Mr. Salisbury refutes amici's claim, brief at 22, that there is no "evidence whatsoever which even remotely suggests" that sources will not continue to give information to the media if this Court grants journalists a right to unilaterally violate promises of

[5]Mr. Finnegan is a member of the board of directors of amicus American Society of Newspaper editors. WHO'S WHO IN AMERICA 1036 (46th ed. 1990-91).

confidentiality. See petitioner's brief at 8-9, 28-29. Moreover, amici's argument contradicts the position of many of these same organizations in cases where they sought to protect their confidential sources. For example, amicus New York Times Co. as an appellant in *Matter of Farber*, 394 A.2d 330, 333 (N.J. 1978), argued that, if confidential sources were to be exposed through a court order, "newsgathering and the dissemination of news would be seriously impaired, because much information would never be forthcoming to the news media unless the persons who were the sources of such information could be entirely certain that their identities would remain secret." Amici supporting the New York Times in *Farber* who are also parties to the amicus brief in this case include the Times Mirror Co., Associated Press, Gannett Co., American Society of Newspaper Editors, and the American Newspaper Publishers Association. 394 A.2d at 331-32.

Amici, brief at 20-21, speculate about possible future cases if respondents are held liable for the consequences of violating their promises. When a similar argument was made in respondents' motion for judgment notwithstanding the verdict, the trial court rejected the premise that the appropriate solution to the possibility of unfounded accusations is to bar the availability of redress to persons with meritorious claims who have been damaged by unlawful conduct. A-67.

In this and any future cases, media organizations making promises of confidentiality have several options consistent with their agreements. They can run the story without revealing the source like the Associated Press, they can decline

to run the story at all like WCCO-TV, or they can refer to the source by type (such as "Republican activist" here) without using his or her specific name. Both the Associated Press and WCCO-TV honored their promises to Mr. Cohen even though they knew that their competition also had the story. R. 394, 398, 402-403, 505-506. Respondents' excuses in their briefs for identifying Mr. Cohen despite their promises could be used to attempt to evade obligations to any other person promised confidentiality. See testimony of Dean Ismach, R. 773-75.

Even respondents' own expert witness, David Lawrence, Jr., conceded that respondents did not follow the "guiding principle" of integrity in this case. R. 1417.

Respondent Cowles Media Co., brief at 21-22, and amici, brief at 17, claim that there is no need to civilly enforce reporter-source agreements because the media purportedly honor the ethical obligations of promises. The Minnesota Court of Appeals disagreed.

> The specter of a large damage award is a much more effective incentive for a publisher to honor a promise of confidentiality than the fear of criticism from other members of the press. Indeed, any such fear of professional criticism in this case was apparently insufficient to convince appellants to abide by their promises. A-34-35.

The trial court also found this argument unpersuasive.

> The newspapers' assertion that "severe criticism from fellow professionals and skepticism, loss of credibility and trust from potential or existing sources" provides sufficient deterrent against journalistic excesses rings not only unrealistic but disingenuous. A-67.

As Minnesota Supreme Court Justice Lawrence Yetka said in his dissent, "The simple truth of the matter is that the appellants made a promise of confidentiality to Cohen in consideration for information they considered newsworthy. That promise was broken and, as a direct consequence, Cohen lost his job." The newspapers should be held responsible for the injuries they caused Mr. Cohen. A-14.

This Court should reverse the decision below because, said Justice Yetka, "the news media should be compelled to keep their promises like anyone else." A-15.

CONCLUSION

The judgment of the Minnesota Supreme Court should be reversed and the judgment of the Minnesota Court of Appeals should be affirmed together with interest in accordance with the law of Minnesota.

Respectfully submitted,

ELLIOT C. ROTHENBERG
Counsel for Petitioner
3901 West 25th Street
Minneapolis, MN 55416
(612) 926-8185

Dated: March 15, 1991.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

CONSTITUTIONAL PROVISIONS:

Table of Authorities Continued

OTHER AUTHORITIES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-634

DAN COHEN,

Petitioner,

v.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Minnesota

BRIEF OF AMICI CURIAE ADVANCE PUBLICATIONS, INC., AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, ASSOCIATED PRESS, THE COPLEY PRESS, INC., GANNETT COMPANY, INC., NEWSLETTER ASSOCIATION, THE NEW YORK TIMES COMPANY, AND THE TIMES MIRROR COMPANY, IN SUPPORT OF RESPONDENTS*

STATEMENT OF INTEREST

Advance Publications, Inc., directly and through subsidiary corporations, publishes newspapers in 22 cities

---

* Written consent of all parties has been filed with the Clerk of the Court, as required by Supreme Court Rule 37.

throughout the United States, operates 16 cable systems across the country, publishes 15 magazines with nationwide circulation, and owns a major national book publishing company.

The American Newspaper Publishers Association is a nonprofit trade association representing about 1,400 newspapers. Membership constitutes about 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the non-daily newspaper circulation, in the United States. These newspapers have the basic function of gathering and publishing news and information. ANPA brings to the case the perspective of a substantial segment of the nation's newspapers, who are directly affected by the Court's decisions in the area of First Amendment protections.

The American Society of Newspaper Editors was founded over 50 years ago. It is a nationwide, professional organization of more than 900 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society include assisting journalists in providing an unfettered and effective press in the service of the American people.

Associated Press, the world's largest news gathering organization, is a mutual news cooperative organized under the Not-for-Profit Corporation Law of the State of New York. Associated Press gathers and distributes news of local, national and international significance to its member newspapers and broadcast stations in the United States and throughout the world.

In carrying out its vital role of informing the public, Associated Press and its members have a significant interest in protecting the accurate reporting of matters of public concern and ensuring that sanctions are not imposed on the press for so reporting. They are also vitally concerned with maintaining the integrity of the editorial function, and preventing intrusion into that function that may result in obstructing public access to information key to the political process.

The Copley Press, Inc. publishes five daily newspapers in California—*The San Diego Union*, *San Diego Tribune*, *The Daily Breeze*, *The News-Pilot* and *The Outlook*—whose combined circulation exceeds 500,000 copies daily, as well as seven daily newspapers in Illinois, and operates an international news service.

Gannett Company, Inc. is a nationwide news and information company that publishes 82 daily newspapers (including *USA Today*), a variety of non-daily publications (including *USA Weekend*, a newspaper magazine) and operates 10 television stations, 15 radio stations, Gannett News Services, and the largest outdoor advertising company in North America.

The Newsletter Association is the international trade association representing 850 publishers of newsletters and specialized information services. The Newsletter Association has a long-standing commitment to the free exchange of information and opinion through the written word as protected by the First Amendment.

The New York Times Company publishes 33 newspapers, including *The New York Times*, a daily newspaper with national circulation of 1.15 million daily and Sunday circulation of over 1.7 million. The Company also publishes 17 magazines and owns five television and two radio stations.

The Times Mirror Company publishes the *Los Angeles Times*, a newspaper with a circulation of more than 1.2 million daily and more than 1.5 million on Sunday. Times Mirror also publishes seven other newspapers including *Newsday*, the *Baltimore Sun*, and *The Hartford Courant*, with a combined Sunday circulation of more than two million copies.

SUMMARY OF ARGUMENT

The relationship between reporters and their sources has historically been one of mutual trust, which gives rise to mutual ethical obligations: in providing information to a

reporter, the source has an ethical obligation to be truthful and the reporter, in turn, has an ethical obligation to keep the source's identity confidential, if the source so desires.

Petitioner is asking this Court to hold that these ethical obligations between reporters and their sources are legally enforceable obligations, disregarding the distinction between these ethical understandings and typical commercial agreements, as well as the First Amendment interests which would be adversely affected by such a decision. *Amici curiae* urge this Court to reject Petitioner's request and instead hold that the judicial enforcement of ethical obligations between reporters and their sources would violate the First Amendment in the circumstances presented here, where there was no reasonable expectation that a civilly enforceable agreement was being entered into.

The principle upon which Petitioner's case ultimately rests - that the media are not exempt from the application of general laws, such as tax, contract, and labor laws - has no relevance here. This principle applies only to non-discriminatory regulations of commercial activities, which have no more than an incidental effect on the news gathering and dissemination process. Government actions which directly impact on the media's ability to gather and disseminate truthful information, however, fall within the ambit of the First Amendment. (See Section 1(A), *infra.*)

Accordingly, this Court must evaluate the propriety of applying general promissory estoppel principles to reporter-source understandings by weighing the interests in enforcing such understandings against the First Amendment interests in gathering and disseminating truthful information to the public. (*Id.*) That analysis demonstrates Respondents should prevail here.

First, there is no significant state interest, let alone a compelling one, in enforcing reporter-source understandings. These understandings do not have the characteristics common to civilly enforceable agreements, because they are not based on an expectation that they are legally enforceable agreements. (See Section 1(B)(i), *infra.*) Moreover, by their very nature, such understandings do not involve a "meeting of the minds," because they are typically vague, do not have precisely defined or understood terms, and involve situations where one party to the "agreement"—the reporter—cannot know what information is being provided (and, therefore, cannot know what is being agreed to) until after an assurance of confidentiality has been made. Thus, reporter-source understandings are clearly not intended to be nor can they reasonably be interpreted to be within the realm of general promissory estoppel law. (See Section 1(B)(ii), *infra.*)

Moreover, reporter-source understandings do not involve the type of interests which promissory estoppel law is designed to protect. Here, Petitioner's only interest is the purported right to engage in a political smear campaign without taking responsibility for his action. That interest is no interest at all. In any event, the obligation which arises from the reporter-source relationship is an ethical one, the enforcement of which comes from self-policing mechanisms, rather than government mandate. (See Section 1(B)(iii), *infra.*)

Second, there are First Amendment interests which would be adversely affected by the judicial enforcement of such understandings. Petitioner is seeking to inhibit the dissemination of truthful information in contravention of well-established principles protecting the dissemination of such information. (See Section 1(C), *infra.*) Moreover, the information he seeks to restrain involves the conduct of government affairs, which is at the very core of the First Amendment's protection. (*Id.*) Civil enforcement of reporter-source understandings, and the concommitant litigation which would ensue, would unquestionably chill the dissemination of such information. (*Id.*)

The strong public interest in protecting the truthful dissemination of information about government affairs outweighs the minimal or non-existent interest in enforcement of reporter-source understandings in this case. Consequently, this Court should hold, as it has in analogous

cases, that state interference with protected speech, by civilly enforcing reporter-source understandings, is constitutionally impermissible in the circumstances presented here. (See Section 1(D), *infra*; see also note 14, *infra*.)

In the alternative, if this Court believes that enforcement of such understandings is permissible in some instances, *amici* urge this Court to adopt strict requirements which must be satisfied to pursue promissory estoppel actions against the media to protect the First Amendment interests in gathering and disseminating truthful information about political affairs to the public. (See Section 2, *infra*.) Although adoption of these safeguards would not eliminate the constitutional concerns raised by *amici*, if this Court permits any promissory estoppel actions to be pursued, these devices would provide at least some measure of protection for the gathering and dissemination of information under the First Amendment and retard the growing proliferation of claims asserting a wide variety of "understandings," including purported agreements to keep identities hidden or masked, to allow pre-publication review of articles, or to give a source "favorable coverage."

ARGUMENT

1. JUDICIAL ENFORCEMENT OF AN ETHICAL OBLIGATION NOT TO PUBLISH TRUTHFUL INFORMATION ABOUT POLITICAL CAMPAIGNS VIOLATES THE FIRST AMENDMENT.

The scope of First Amendment protection for gathering and disseminating information must be determined by considering the interests served by the freedoms of speech and press, as well as any competing interests served by restricting that speech. See, *e.g.*, *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986) (when deciding whether laws that impinge on associational freedom violate the First Amendment, "a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State, as justifications for the burden imposed by its rule. In passing judgment, the court must not only determine the legitimacy and strength of each of those interests: it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights."); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 106 (1979) ("we have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented") (Rehnquist, J., concurring); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 (1985) ("[t]o make this determination we . . . balance the State's interest . . . against the First Amendment interest in protecting this type of expression").

As discussed in the following sections, judicial enforcement[1] of an understanding between a source and a reporter, that would allow the source to inject misleading information into the public debate during an election in an effort to smear a political opponent, furthers no legitimate state interest, while endangering the constitutional freedom of editors to decide what to publish and the right of the public to know the whole truth about that political campaign. This Court should hold, therefore, that the First Amendment does not permit judicial enforcement of such ethical obligations in the circumstances of this case.

A. The Principle That The Media Are Not Exempt From The Application Of General Laws Is Completely Irrelevant To This Case, Which Involves A Direct Restriction On The Gathering And Dissemination Of Truthful Information To The Public.

Petitioner's entire argument is based on the premise that, because the media are not exempt from the appli-

---

[1] Petitioner contends that no state action arises from judicial enforcement of civil suits for damages. That proposition has been squarely rejected by this Court. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

cation of general laws, understandings between reporters and sources also must be subjected to the application of general promissory estoppel principles without any consideration of the First Amendment. (See, *e.g.*, Petitioner's Brief at 22-24.) That premise is fatally flawed.

There is no dispute that the media are, like any other citizens, subject to the application of general laws and regulations concerning commercial activities. As this Court noted in *Associated Press v. United States*, 326 U.S. 1 (1945), "[t]he fact that the publisher handles news while others handle food does not . . . afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices." 326 U.S. at 7. In keeping with this principle, this Court has held, among other things, that the media are not exempt from the antitrust laws (*Associated Press*, *supra* (applying Sherman Antitrust Act)), from the federal labor laws (see, *e.g.*, *Associated Press v. N.L.R.B.*, 301 U.S. 103, 132-33 (1937) (applying National Labor Relations Act)), or from generally applicable taxes (see, *e.g.*, *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 587 n.9 (1983)).

This principle - that when conducting commercial activities, the media are no different from other commercial enterprises and, therefore, are subject to the application of general laws - which principle we do not dispute, simply has no application here. It *only* applies when the state action is a nondiscriminatory regulation of commercial activities,[2] which has no more than an incidental or minimal

[2] Thus, this Court has recognized that laws which differentially apply to the media must be carefully scrutinized to ensure that they are not used as tools of government censorship. For example, in *Minneapolis Star*, this Court struck down a state statute which imposed differential taxes on newspapers, noting that "[d]ifferential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Minneapolis Star*, *supra*, 460 U.S. at 585 (footnote and citations omitted). See also *Grosjean v. American Press Co.*, 297 U.S. 233, 250, 251 (1936) (invalidating state tax which applied only to large newspapers).

effect on the gathering and dissemination of information to the public. In contrast, government actions which directly impact the media's ability to gather and disseminate information are subject to challenge on First Amendment grounds.[3] See, *e.g.*, *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311-12 (1977) (court order restraining media from publishing name of juvenile obtained at open court proceeding violates First Amendment); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (invalidating, on First Amendment grounds, state statute which punished publication of rape victim's name); *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 258 (1974) (state statute compelling newspapers to publish "reply" by political candidates violates First Amendment).

This case falls within this latter category. The issue before this Court is not whether a media enterprise is bound by commercial agreements it has entered into, *e.g.*, an agreement to purchase newsprint, to use printing facilities, or to purchase vehicles to deliver newspapers. Application of general legal principles to those types of commercial agreements, which are only incidentally related to the news gathering and dissemination process, is plainly constitutional. Here, however, Petitioner seeks to restrict directly the media's ability to gather and disseminate information to the public, by transforming what is, at most, an ethical obligation to maintain the confidentiality of a source's identity into a legally enforceable promise. That restriction on the media falls within the First Amendment's protections.

[3] One noted commentator has distinguished these two areas by defining the commercial realm as encompassing "the production and exchange of goods and services for profit," while the realm of information gathering and dissemination involves "the production or exchange of ideas." T. Emerson, *The System Of Freedom Of Expression* 414 (1970); see also Note, *Freedom of Expression in a Commercial Context*, 78 Harv. L. Rev. 1191, 1192, 1194-95 (1965) (distinguishing these two areas).

The First Amendment has particular force here, because the information sought to be restrained is *truthful* information about the conduct of *government affairs*. As this Court noted in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), "state action to punish the publication of *truthful information* seldom can satisfy constitutional standards." 443 U.S. at 102 (emphasis added).

Indeed, under any view, the publication of information concerning matters of public concern, especially political campaigns, is at the heart of the First Amendment's protection. As this Court noted in *Mills v. Alabama*, 384 U.S. 214, 218 (1966): "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." See also *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("[t]he maintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system"); *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) ("[t]he free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign"; thus, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office"); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) ("[d]ebate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution"); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S. Ct. 2678, 2695, 2696 (1989) ("[v]igorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty"; consequently, it is a "value [that] must be protected with special vigilance"); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 109 S. Ct. 1013, 1020 (1989) ("the first amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office").

Accordingly, this Court should not accept Petitioner's misleading assertion that the First Amendment has no application here because all that is involved is the application of general laws. Instead, this Court must evaluate the constitutionality of applying general promissory estoppel principles to reporter-source understandings, by assessing the interests in enforcement of such ethical obligations versus the First Amendment interests in protecting the gathering and dissemination of truthful information to the public about elections. The following sections demonstrate that when Petitioner's interests are evaluated against Respondents' First Amendment interests, Petitioner cannot overcome the First Amendment interests at stake here.

B. No Significant, Let Alone Compelling, State Interest Would Be Served By Converting Ethical Understandings Between Sources And Reporters Into Civilly Enforceable Promises.

Because of the First Amendment interests in protecting the gathering and dissemination of information to the public (see Section 1(A), *supra*, and Section 1(C), *infra*), this Court has recognized that there must be a compelling government interest which justifies using the might of the state to restrict news gathering and dissemination. (*Id.*) For example, in *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980), this Court held that the importance of protecting national security, and in particular, the effective operation of America's foreign intelligence service, were compelling interests which justified enforcement of an agreement by a former government employee to submit a manuscript to pre-publication review by the Central Intelligence Agency.

There is no similarly compelling interest here. As set forth below, the general principles of promissory estoppel simply do not apply to reporter-source understandings, which do not have the characteristics of civilly enforceable agreements and which do not involve the type of interest which promissory estoppel is designed to protect. Conse-

quently, there is no, or at most a minimal, state interest in civilly enforcing reporter-source understandings.

i. Unlike Typical Promissory Estoppel Situations, Reporter-Source Understandings Are Not Based Upon An Expectation That The Understanding Is Legally Enforceable.

The Minnesota Supreme Court held, as a matter of state law, that a reporter's promise of confidentiality does not constitute a binding contract. (Pet. App. A7-A10.)[4] Because this holding was grounded in state law, rather than federal law, it is not subject to review by this Court. See, *e.g.*, *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the State's highest court with respect to state law are binding on the federal courts"). Consequently, the only issue before this Court is whether the state interests served by Petitioner pursuing a civil damages claim on a theory of promissory estoppel overcome the First Amendment interests at issue here. The answer is that they do not.[5]

As the Minnesota Supreme Court recognized, a claim for promissory estoppel is premised on reasonable reliance, *i.e.*, that the source reasonably relied on the promise of confidentiality. 457 N.W.2d at 203, 204. In the typical case of a reporter and a source, there simply is no such "reliance," because there is no reasonable expectation that any understanding they reach concerning confidentiality is

---

[4] The Minnesota Supreme Court indicated that it was "not persuaded that in the special milieu of media news gathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract. . . . The parties understand that the reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract." *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 203 (Minn. 1990).

[5] We agree with Respondents that certiorari in this case was improvidently granted, especially because this issue was not tried or briefed below.

civilly enforceable.[6] The fact that there are no prior reported cases like this one, in which a source has successfully sued a reporter for allegedly "breaching" an understanding about confidentiality,[7] demonstrates that such understandings have not previously been conceived of as legally enforceable agreements.

That conclusion is reinforced by some well-known instances in which the identity of a source has been revealed, despite an understanding of confidentiality between the

---

[6] This requirement should have ended the Minnesota Supreme Court's analysis, because it had already determined that the parties neither intended nor anticipated that their purported "agreement" would be anything more than a non-binding, non-enforceable moral commitment. See, *e.g.*, 457 N.W.2d at 203. At the very least, it means that Petitioner's reliance interest is not of significant weight here.

[7] Prior to *Cohen*, the closest analogy would have been *Huskey v. National Broadcasting Co., Inc.*, 632 F. Supp. 1282 (N.D. Ill. 1986), in which the district court denied the defendant's motion to dismiss a breach of contract claim brought by a prison inmate who claimed that NBC violated a provision of its agreement with the prison that forbade photographing inmates without their consent. 632 F. Supp. at 1292-93. That decision received little attention, however, and no subsequent decision has been reported. The few other cases prior to *Cohen* that raised contract claims were unsuccessful. See, *e.g.*, *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 81, 155 Cal. Rptr. 29 (1979) (affirming trial court's JNOV against plaintiff's breach of contract claim, which arose out of the defendant's agreement not to disclose any information about her attendance at plaintiff's therapy group sessions).

However, *Cohen*, and the widely publicized controversy it has generated, has provoked a substantial number of reported decisions involving breach of contract or related claims, arising out of reporters' ethical obligations not to publish certain information. See, *e.g.*, *Virelli v. Goodson-Todman Enterprises, Ltd.*, 142 A.D.2d 479, 536 N.Y.S.2d 571, 576-77 (1989) (dismissing suit for invasion of privacy and emotional distress brought by interviewees who claimed agreement not to reveal their identities was violated); *Doe v. American Broadcasting Co.*, 152 A.D.2d 482, 543 N.Y.S.2d 455 (1989) (suit by rape victims for breach of contract and emotional distress arising out of alleged violation of promise of anonymity); *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289 (D. Minn. 1990) (district court dismissed suit for breach of contract and other claims arising out of alleged violation of confidentiality agreement), *appeal pending*.

source and the reporter, without giving rise to litigation. See, *e.g.*, Kase, *When A Promise Is Not A Promise: The Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources*, 12 Hastings Comm/Ent. L.J. 565, 576 (1990) (citing, among other instances, the disclosure of Daniel Ellsberg as the source of the "Pentagon Papers" and of Lt. Col. Oliver North as the source of information about retaliation against the terrorists who hijacked the Achille Lauro cruise ship); see also examples cited in Respondent Northwest Publications, Inc.'s Brief, Argument, Section II(B).[8]

Moreover, in this case, the source—Petitioner Cohen—was a sophisticated political insider used to dealing with the media. As the Minnesota Supreme Court recognized, "[f]or many years Cohen had been active in politics as a campaign worker, a candidate, and as an elected public official." 457 N.W.2d at 201 n.3; see also Petitioner's Brief at 21 (where Cohen adopts the Minnesota Court of Appeal's characterization of him as an "experienced political operative"). As a sophisticated public figure, who then worked in public relations, Petitioner had to know that such understandings with reporters were not civilly enforceable. Petitioner cannot claim, therefore, that he reasonably believed his understandings with Respondents' reporters were legally enforceable contracts. Because there was no reasonable reliance by Petitioner, the state interest in recognizing a promissory estoppel claim here is minimal or nonexistent.[9]

[8] This is not to suggest that a decision to reveal a source's identity occurs frequently or without careful consideration. In the case involving Lt. Col. Oliver North, for example, he was identified as a source only after he publicly accused Congress of leaking secret intelligence information to the press, which he himself had provided as a "confidential source." *Two Leaks, But by Whom?*, NEWSWEEK, July 27, 1987, at 16. In another case, a Chicago Sun Times reporter identified "confidential source" Jody Powell as the source of information damaging to Senator Charles Percy, who had been critical of budget director Bert Lance, after it was learned that the information was completely false. Smyser, *There Are Sources and Then There Are "Sourcerers,"* Soc. Resp.: Journalism, Law, Med. 13, 17-18 (1979).

ii. Reporter-Source Understandings Do Not Involve A "Meeting Of The Minds."

Reporter-source understandings are also distinguishable from ordinary promissory estoppel situations because they do not involve a true agreement, upon which the parties justifiably rely. Such understandings are vague, and invariably involve terms that have no well-established meaning or that are susceptible to more than one reasonable interpretation. For example, if the source provides information on a "not for attribution" basis, the reporter may believe that he can describe the source, so long as he does not identify the source by *name* ("a government official," "a member of the defense team," "a Cabinet member"); the source, however, may intend that *no* identifying information of any kind be published. Similarly, the source and reporter may have different interpretations of the meaning of statements like "off the record," "confidentially," or "as background only." The source may intend that none of the information provided ever be published, while the reporter may believe that the information can be published, so long as it is not attributed to any source. Under these circumstances, which are quite typical, there is no true "meeting of the minds."

Furthermore, unlike typical promissory estoppel situations, the very nature of a reporter-source relationship means that the reporter does not know what information is being provided until after the assurance of confiden-

[9] As the Minnesota Supreme Court recognized, there may be circumstances in which a promissory estoppel claim could survive First Amendment scrutiny. 457 N.W.2d at 205. Thus, for example, if Petitioner had bargained for and received an explicit promise that he could bring a civil suit for damages if the confidentiality understanding was violated, a different case might be presented, because he would have had a clear expectation that a civil remedy was available. This Court does not need to decide what rule would be appropriate in that situation, however, because that situation is not presented by the facts of this case.

tiality has been extracted. Thus, there is no true "meeting of the minds" between the reporter and the source, and can never be one, because the reporter does not know the actual terms to be agreed upon.

For example, if, after extracting an assurance of confidentiality, the source "revealed" information that the reporter already knew or that the source had previously revealed to the reporter or to others *without* any discussion of confidentiality,[10] the source could not possibly believe that there was an agreement, upon which the source could justifiably rely, such that the reporter was really agreeing not to use that information.

Similarly, no source who extracts an assurance of anonymity from a reporter can possibly believe that, if he tells the reporter that he is responsible for the murder of a prominent citizen, the reporter can be held liable for payment of civil damages if he "breaches his promise" by revealing the source's identity. There simply is no "meeting of the minds" because in the usual situation, the reporter never knows what he or she is going to be told.

It is precisely this lack of any meeting of the minds that has kept reporter-source understandings in the realm of ethics rather than law. Petitioner's pretense that everyone has always known that there is a civilly enforceable "agreement" when a source is assured of confidentiality not only contradicts reality, it demonstrates the insubstantial nature of the state interest involved here.

iii. Reporter-Source Understandings Do Not Involve The Type Of Interest Which Promissory Estoppel Law Is Intended To Protect; Instead, These Understandings Create Ethical, Rather Than Legally Enforceable, Obligations.

As set forth in the preceding sections, the understandings reached by sources and reporters do not have the

[10] In this case, the Star Tribune had independently determined that Petitioner was the source of the information provided. See *Cohen*, 457 N.W.2d at 201; see also Tr. 1572-74, 1599-1601.

characteristics of promissory estoppel obligations. Instead, the obligation created is an ethical one. And, as is true of most ethical obligations, "enforcement" must come from self-policing, rather than a government command. In the case of reporter-source understandings, the mechanisms for self-enforcement of such ethical obligations include a reporter's or editor's professional disgrace, the loss of respect by their peers, and ultimately the loss of sources who no longer believe the reporter or editor to be trustworthy. These are serious penalties. They have worked so well in the past that other sources have not felt the need to sue to enforce such understandings. Indeed, Petitioner does not even attempt to show that these self-policing mechanisms are so inadequate that what always have been ethical obligations must now all be treated as civilly enforceable agreements. Thus, any state interest in civilly enforcing such ethical obligations is quite small.

In addition, the idea that there are areas in which the state has little or no legitimate interest in civilly enforcing ethical obligations is not novel, even under circumstances which give a much stronger appearance of a civilly enforceable agreement (*i.e.*, justifiable reliance and a meeting of the minds), than the case at hand. For example, social engagements may have all the characteristics of enforceable promises: an offer (invitation), acceptance (or promise to attend), and reliance on the promise, to the detriment of the relying party (*i.e.*, cancelling other plans, preparing dinner, hiring a caterer). Nonetheless, unless the parties have expressed a clear intention to be legally bound, such engagements typically are not viewed as creating civilly enforceable agreements. See, *e.g.*, 1 A. Corbin, *Corbin On Contracts*, § 34 (1963).

Similarly, agreements to refrain from marriage generally are not legally enforceable, even though such agreements involve one of the most fundamental relationships in our society and despite the fact that the failure to honor such an agreement can cause tremendous and enduring harm. See *Restatement (Second) of Contracts*, § 189 (1981).

If anything, the state interest here is even less important. Petitioner was attempting to use the media to disseminate misleading information, during an election campaign, about a political opponent and sought to prevent the dissemination of the truth: that he was the source of the smear campaign. Certainly, no important state interest would have been furthered by permitting Petitioner to accomplish this. Thus, there is little or no state interest, let alone a compelling one, in making the ethical obligation here civilly enforceable.

C. First Amendment Interests Are Furthered By Protecting The Dissemination Of Truthful Information To The Public, Particularly Where, As Here, That Information Involves Government Affairs.

This suit is aimed at restricting the rights of the media to obtain and disseminate truthful information to the public about subjects which are at the heart of the First Amendment's protection of free speech and press - the conduct of government affairs and campaigns for public office. (See Section 1(A), *supra*.) That the conduct targeted by Petitioner is encompassed by the First Amendment cannot be questioned.

This Court explicitly recognized the important First Amendment interests in news gathering in *Branzburg v. Hayes*, 408 U.S. 665 (1972). As Justice White wrote: "Without some protection for seeking out the news, freedom of the press could be eviscerated. News gathering is not without its First Amendment protections." 408 U.S. at 681. Later decisions by this Court also stand for the proposition that the gathering of information by the media, for dissemination to the public, is constitutionally protected. See, *e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (in recognizing a constitutional right of access to judicial proceedings, this Court noted that the fact that people primarily acquire information about public affairs through the media instead of by first-hand observation "validates the media claim of functioning as surrogates for the public").

In addition, there is no question that the dissemination of truthful information to the public is protected by the First Amendment. (See cases cited in Section 1(A), *supra*.) Even where the publication of such information causes substantial harm, this Court has repeatedly held that the public's interest in receiving truthful information about matters of public concern outweighs the detrimental impact of the publication on a particular individual. See, *e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 109 S. Ct. 2603 (1989) (emotional injury and fear of later physical harm from dissemination of rape victim's name); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (emotional distress to parents from dissemination of rape victim's identity); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (harm caused by disclosure of juvenile offender's identity); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (same); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (harm to reputation from publication of confidential information about judicial disciplinary proceedings). The harm allegedly caused to Petitioner as a consequence of his identity being revealed, namely, dismissal from his job, is certainly no greater than the harm suffered by the plaintiffs in these cases and, indeed, is much less compelling because he is a public figure,[11] who voluntarily injected himself into the political arena.[12] See, *e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) ("the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased

---

[11] The Minnesota Supreme Court found that Petitioner was a public figure. *Cohen*, 457 N.W.2d at 201 n.3.

[12] Unlike the plaintiffs in the cited cases, Petitioner sought out the media as an instrument for manipulating the political process, through the dissemination of misleading information. Moreover, he "had many years' experience in politics and public relations," 457 N.W.2d at 201; consequently, having voluntarily entered the political arena, Petitioner cannot be heard to complain about the political sting of sunlight—"the most powerful of all disinfectants." P. Freund, *The Supreme Court of the United States* 61 (1949) (paraphrasing former Supreme Court Justice Brandeis).

risk of injury from defamatory falsehood concerning them").

Moreover, as previously discussed, the First Amendment's protection of free speech and press, particularly with regard to information about political campaigns and the conduct of government, is at the very core of the democratic process. As this Court noted in *Cox Broadcasting*, "[w]ithout the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." 420 U.S. at 492. See also cases cited in Section 1(A), *supra*. Thus, the information at issue here is entitled to the highest level of First Amendment protection.

Subjecting reporters who reveal the identity of confidential sources to civil liability would result in the suppression of this constitutionally protected speech. As this Court has recognized, "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (the risk of litigation may cause "would-be critics of official conduct . . . [to] be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' ") (citations omitted).

The likelihood of protracted litigation, and its concommitant chilling effect on the exercise of First Amendment rights, is particularly pronounced here, precisely because of the oral nature of the reporter-source relationship. Typically, there is no documentation of the "agreement," nor any third party witnesses, so that the terms of the "agreement" are not objectively verifiable. As one study on reporter-source relationships noted, " '[c]onfidentiality' in these relationships often takes the form of an unspoken

trust that the reporter will treat the information with care and will know what to use and what not to use. Frequently there is not an explicit agreement about what is on and off the record." Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Mich. L. Rev. 229, 243 (1971). In addition, as noted in Section 1(B), *supra*, the parties may have entirely different interpretations of the meaning of terms such as "not for attribution," "off the record," or the numerous other possible "understandings" a source may claim.

These ambiguities, which are inherent in the very nature of these relationships, create fertile ground for sources to dispute reporters' later actions. Indeed, to impose civil liability on these ethical obligations is to issue an open invitation to any source who is dissatisfied with a publication to claim later that there was an "oral agreement" or "understanding" of some sort which the reporter breached—for example, about not revealing the source's identity, not publishing confidential information, the reporter's failure to allow the source to review the article prior to publication, the failure to treat the source favorably, the failure to adequately explain the source's views, the inclusion of information or points of view the source does not wish to be associated with, and so on, *ad infinitim*.

It is certainly not uncommon for sources, when they see an actual article, to be disappointed by it and to feel unfairly treated because the reporter has not concluded that the source or the source's views are right, just, and proper and the source's opponents or their views are wrong, unwise, and immoral. If sources are allowed to continually embroil journalists in burdensome and expensive litigation, which will involve a swearing contest between the sources and the reporters about alleged oral "agreements" and "understandings," and which, therefore, will be virtually impossible to dispose of summarily, "editors might well conclude that the safe course is to avoid controversy." *Miami Herald*, 418 U.S. at 257.

Petitioner's response, namely, that enforcement of reporter-source understandings will somehow "improve" the relationship between reporters and their sources, and prevent those sources from "drying up" (Petitioner's Brief at 27-29), is untenable. Despite the fact that previous cases had not held that such understandings were legally enforceable,[13] confidential sources have and will continue to cooperate with reporters. As the district court noted in *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289 (D. Minn. 1990), *appeal pending*:

> It is not clear whether potential sources would dry up if reporter-source agreements were unenforceable. Confidential sources often have an interest in making their information public. That interest, and the source's relationship of trust with the reporter, may outweigh the fact that there is no legal remedy for a breach.

Id. at 1299. Petitioner has not presented any evidence whatsoever which even remotely suggests that those relationships will not continue, without a civil remedy by sources against reporters.

In any event, it is not the province of the courts to "improve" the relationship between sources and reporters, any more than it is the province of the courts to "improve" editorial judgments.[14] As this Court noted in *Miami Herald*, "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." 418 U.S. at 256.

Even in the media, there was no consensus as to what was the proper ethical or editorial judgment here. The

---

[13] See, note 7, *supra*.

[14] The government is not permitted to intrude into the relationship between reporters and their sources in this manner, any more than it should be allowed to interfere with that relationship by attempting to compel reporters to reveal the identities of their confidential sources. It is simply not up to the courts to improve relationships between sources and reporters.

Associated Press, one of the *amici* here, exercised its editorial judgment differently than the two Respondents, choosing not to disclose Petitioner's identity. (Joint App. at 11; Tr. 395.) That simply demonstrates that here, as in most cases, editorial or ethical judgments on difficult questions may differ. That very lack of a consensus as to what was "proper" conduct shows that the issue here is better left to ethics than to law.

As this Court concluded in *Miami Herald*:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

418 U.S. at 258.

Just as in *Miami Herald*, the civil enforcement of reporter-source understandings would severely interfere with the media's exercise of editorial judgment. Moreover, the threat of burdensome and oppressive litigation would operate as a substantial impediment to the exercise of important First Amendment rights. These concerns outweigh the minimal (at most) state interest in civilly enforcing reporter-source understandings.

D. Application Of The Test Applied In Analogous Areas, Such As Invasion Of Privacy Cases, Demonstrates That Civil Enforcement Of Typical Reporter-Source Understandings Is Constitutionally Impermissible.

Petitioner's claim in this case, reduced to its essence, is virtually indistinguishable from the invasion of privacy claims advanced in *Florida Star* and *Daily Mail*. The basis for his claim, as in those cases, is that private informa-

tion—his identity—has been revealed and that the state has an interest in protecting him from disclosure of that information. Analyzing Petitioner's claim from the perspective of a privacy action, however, further demonstrates that the important First Amendment interests in disclosure of the "private" information outweighs any interest Petitioner has in its secrecy.[15]

The rule advanced by this Court in *Daily Mail* and *Florida Star* for evaluating the constitutionality of the government's action is that publication of truthful information, lawfully obtained, about a matter of public concern, may not be punished except to directly advance a state interest of the highest order. See *Daily Mail*, 443 U.S. at 103; *Florida Star*, 109 S. Ct. at 2613.

Here, there is no dispute that the information published by Respondents was truthful, nor is there any dispute that it involved a matter of public concern—the conduct of a political campaign.

Furthermore, there is no evidence that the information published by Respondents was obtained unlawfully. To the contrary, the only discussion of that issue in the Minnesota Court of Appeals' opinion indicates that Respondents did not violate Minnesota law in obtaining the information from Petitioner. *Cohen v. Cowles Media Co.*, 445 N.W.2d 248, 268 (Minn. Ct. App. 1989) ("[t]here was no wrongful act of [Respondents] in connection with the conduct of their reporters or in the acquisition of information peddled by [Petitioner]") (Crippen, J., concurring in part and dissenting in part). The Minnesota Supreme Court also found that there was no violation of Minnesota contract law. 457 N.W.2d at 203. Moreover, empirical evidence indicates that the methods employed by Respondents to obtain information from Petitioner were far from unorthodox, let alone

[15]Indeed, Minnesota does not even recognize a cause of action for invasion of privacy. See, *e.g.*, *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1302 (D. Minn. 1990), *appeal pending* (citing *Stubbs v. North Mem. Medical Center*, 448 N.W.2d 78, 80-81 (Minn. Ct. App. 1989); *Hendry v. Conner*, 303 Minn. 317, 226 N.W.2d 921, 923 (1975)).

illegal. See, *e.g.*, Blasi at 239-45 (describing some of the techniques reporters use to obtain information from confidential sources).

Petitioner's response that the First Amendment does not permit the media to commit "torts and crimes" in news gathering (Petitioner's Brief at 30) misses the mark. It is certainly true that a reporter cannot commit burglary to obtain documents or murder a source, and then claim First Amendment protection. That does not mean, however, as Petitioner asserts, that there is no First Amendment protection if a "tort" is committed. To the contrary, this Court has repeatedly invoked the protection of the First Amendment to restrict the imposition of strict tort liability on the media. See, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 ("the constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct"), and its progeny.

Moreover, Petitioner's assertion that Respondents' actions were unlawful is based on circular reasoning. According to Petitioner, the First Amendment does not bar his claim because Respondents acted unlawfully, but the only supposed "unlawful" action alleged is the purported violation of the ethical understanding of confidentiality here. This begs the question of whether Respondents did anything unlawful. Respondents' acquisition of information from Petitioner was simply a "newspaper reporting technique" permitted by *Daily Mail*. 443 U.S. at 103 (asking people for information, who by law are bound not to disclose it, is such a technique).

The only remaining issue, therefore, is whether enforcement of reporter-source understandings directly furthers a state interest "of the highest order." As discussed in Section 1(B), *supra*, there is *no* state interest, let alone one "of the highest order," which justifies civil enforcement of reporter-source agreements. Moreover, the strong First Amendment interest in protecting the gathering and dissemination of information to the public easily outweighs

any minimal state interest which exists. Thus, under this Court's prior decisions in *Daily Mail* and *Florida Star*, reporter-source understandings are not civilly enforceable.

2. EVEN ASSUMING, *ARGUENDO*, THAT LIMITED ENFORCEMENT OF REPORTER-SOURCE UNDERSTANDINGS IS CONSTITUTIONALLY PERMISSIBLE, THE FIRST AMENDMENT REQUIRES APPROPRIATE SAFEGUARDS TO ENSURE THE "BREATHING SPACE" ESSENTIAL TO THE EXERCISE OF FREE SPEECH AND PRESS RIGHTS.

Even if this Court were to determine that, under some circumstances, understandings between reporters and their sources should be enforced by the courts, the important First Amendment interests in protecting the gathering and dissemination of information to the public mandate the imposition of limits on any such enforcement. As this Court noted in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974):

> In our continuing effort to define the proper accommodation between these competing concerns [*i.e.*, free speech and press and redress of individual wrongs], we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. . . . To that end this Court has extended a measure of strategic protection to defamatory falsehood.

Id. at 342 (citation omitted). In accordance with that concern, this Court has, as a matter of federal constitutional law, adopted various requirements in defamation cases to safeguard against the prosecution of spurious claims.[16]

[16] For example, public officials and figures are required to prove that statements were made with constitutional "actual malice," *i.e.*, with knowledge of the statements' falsity or while entertaining serious subjective doubts as to their truth or falsity. See, *e.g.*, *Harte-Hanks*, *supra*, 109 S. Ct. at 2696. Plaintiffs in cases against media defendants, where a publication of information of public interest is concerned, also have the burden of proving that the allegedly defamatory statements are false. See, *e.g.*, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).

Similarly, if this Court permits Petitioner and others like him to pursue promissory estoppel claims against the media, it must adopt strict standards for bringing and maintaining such actions in order to protect the First Amendment values at stake here.

First, to avoid the potential chilling effect which results from the media's engagement in protracted and expensive litigation (see Section 1(C), *supra*), marginal claims must be discouraged at the outset or must be capable of being disposed of summarily at an early stage. To accomplish this goal, plaintiffs must be required to prove by clear and convincing evidence the existence of an agreement and the clear, specific terms of that agreement. See, *e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (applying clear and convincing evidence standard in public figure defamation cases); see also *Ruzicka*, 733 F. Supp. at 1298 (purported agreement not to identify source was found to be "too vague to constitute a waiver of the defendants' first amendment rights"). Ambiguous terms or understandings should be construed against the source seeking to enforce the "agreement" or "understanding."[17]

Second, the source must expressly request and the reporter must expressly agree that any such agreement can be enforced by a civil action for damages. In this way, reporters will be put on notice that breach of *these* ethical obligations can lead to civil damages and that reporters should not proceed unless they are prepared to accept those consequences. The source must also be required to prove by clear and convincing evidence that the media's conduct clearly and intentionally violated the terms of the agreement.

Third, to protect the press from defending burdensome litigation in cases where the plaintiff was not actually dam-

[17] This goal would be further served if plaintiffs were barred from recovery on oral, as opposed to written, understandings. As one noted authority on contract law wrote, "[r]eduction to writing undoubtedly tends to prevent not only fraud and perjury but also the disputes and litigation that arise by reason of treacherous memory and the absence of witnesses." 2 A. Corbin, *Corbin on Contracts* 13 (1950).

aged by the purported "breach," the source should be required to demonstrate proof of special damages before being permitted to proceed with the lawsuit. This is consistent with the common law requirement that certain types of defamation, *i.e.*, libel and slander per quod, are not actionable without proof of special damages.[18] Moreover, consistent with the general principles of promissory estoppel, only consequential or special damages should be recoverable. See *Cohen*, 445 N.W.2d at 260-61 (Cohen was limited to recovering nonpunitive, compensatory damages resulting from the purported breach of contract).

Fourth, because media entities, no less than other enterprises, should be free from liability based upon the unratified actions of subordinate employees, this Court should hold that a media entity cannot be held civilly liable absent a showing that its representative—whether a "reporter" or an "editor"—is clearly vested with authority to accept the terms of the "agreement" on confidentiality. See, *e.g.*, *Poteet v. Roswell Daily Record, Inc.*, 92 N.M. 170, 584 P.2d 1310, 1312-13 (Ct. App. 1978) (in action for invasion of privacy, reporter's alleged promise not to reveal rape victim's name "was insufficient to show waiver without raising the additional requirement of the reporter's authority to speak for the defendant. . . . Absent authority, the statements of the reporter could not be considered as a waiver of a constitutional privilege by the defendant newspaper"); see also *New York Times Co. v. Sullivan*, 376 U.S. at 287 (state of mind for actual malice must be that of individuals "having responsibility for the publication").

Fifth, to minimize restraints on the dissemination of truthful information, this Court should hold that "agreements" or "understandings" of confidentiality are not civilly enforceable if the information which is to be kept

[18] See, *e.g.*, *Restatement (Second) of Torts* §§ 569-575 (1977); see also W. Keeton, *Prosser and Keeton on Torts* 788 (5th ed. 1984) (special damages requirement of common law was intended to limit unmeritorious claims).

confidential—whether the identity of a source, or certain information provided by a source—is already public or has been independently obtained by the reporter through other means. See, *e.g.*, *Smith v. Daily Mail Publishing Co.*, 443 U.S. at 104-05 (even assuming that statute restricting newspapers from publishing identity of youths involved in juvenile proceedings "served a state interest of the highest order," it could not accomplish its stated purpose where other media, like radio stations, publicized that information).

Finally, because the information sought to be restrained relates to matters which are at the core of our democratic system, and, therefore, which are worthy of the most stringent constitutional protection, this Court should look to its decision in *Gertz*, which forbade the application of liability to the media in cases involving false statements without a showing of fault. 418 U.S. at 347. Because *truthful* statements should be given even greater protection (see, *e.g.*, *Florida Star*, 109 S. Ct. at 2613), this Court should adopt a high standard of fault with respect to the breach of reporter-source obligations.

For example, sources could be required to demonstrate that the reporter or editor induced the source to reveal information with representations of confidentiality that they did not intend to keep at the time those representations were made. Alternatively, the source could be required to demonstrate that the reporter or editor acted with gross irresponsibility. See, *e.g.*, *Virelli*, 536 N.Y.S.2d at 576-77.

Adoption of these safeguards does not eliminate the constitutional concerns expressed in Section 1, *supra*. To the extent that the Court is inclined to find some enforceable obligation, however, *amici* urge this Court to strictly limit the application of those principles in order to protect the important First Amendment interests involved here.

CONCLUSION

For all of the reasons set forth above, *amici* urge this Court to hold that the judicial enforcement of reporter-

source understandings, like the one in *Cohen*, would violate the First Amendment to the United States Constitution. In the alternative, if this Court determines that there are some circumstances in which such understandings should be judicially enforced, *amici* urge the adoption of the safeguards set forth above to protect the important First Amendment interests involved.

DATED: February 22, 1991.

Respectfully submitted,

REX S. HEINKE
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

Counsel of Record
for *Amici Curiae*

Of Counsel:

ROBERT S. WARREN
KELLI L. SAGER
DAVID LOPEZ
GIBSON, DUNN & CRUTCHER

JERRY S. BIRENZ
RALPH P. HUBER
SABIN, BERMANT & GOULD
350 Madison Avenue
New York, New York 10017

Attorneys for Advance Publications, Inc.

W. TERRY MAGUIRE
RENE P. MILAM
American Newspaper Publishers Association
The Newspaper Center
11600 Sunrise Valley Drive
Reston, Virginia 22091

Attorneys for American Newspaper Publishers Association

RICHARD M. SCHMIDT
COHN & MARKS
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Attorneys for American Society of Newspaper Editors

RICHARD N. WINFIELD
LOUISE SOMMERS
ROGERS & WELLS
200 Park Avenue
New York, New York 10166

Attorneys for Associated Press

HAROLD W. FUSON, JR.
JUDITH L. FANSHAW
The Copley Press, Inc.
7776 Ivanhoe Avenue
La Jolla, California 92038

Attorneys for The Copley Press, Inc.

BARBARA WARTELLE WALL
Gannett Company, Inc.
1100 Wilson Boulevard
Arlington, Virginia 22234

Attorney for Gannett Company, Inc.

JAMES E. GROSSBERG
ROSS, DIXON & MASBACK
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Attorneys for Newsletter Association

GEORGE FREEMAN
The New York Times Company
229 West 43rd Street
New York, New York 10036

Attorney for The New York Times Company

DANIEL A. CURRY
WILLIAM A. NIESE
PHILIP E. KUCERA
The Times Mirror Company
Times Mirror Square
Los Angeles, California 90053

Attorneys for The Times Mirror Company